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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM DECISIONS OF OCTOBER 5, 1897, TO AND INCLUDING DECISIONS OF JANUARY 11, 1898,

WITH

NOTES, REFERENCES AND INDEX

By EDMUND H. SMITH,
STATE REPORTER.

VOLUME 154.

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Rec. Apr. 7, 1898.

JUDGES OF THE COURT OF APPEALS.

CHARLES ANDREWS,* CHIEF JUDGE.

ALTON B. PARKER,† CHIEF JUDGE.

JOHN C. GRAY,

DENIS O'BRIEN,

EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES.

* Term expired December 31, 1897, by force of provision of State Constitution (Art. 6, § 12), prohibiting a judge from holding office "longer than until and including the last day of December next after he shall be seventy years of age."

† Elected November 2, 1897; term commenced January 1, 1898.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CHICAGO JUNCTION RAILWAYS AND UNION STOCKYARDS COMPANY, Appellant, v. JAMES A. ROBERTS, as Comptroller of the State of New York, Respondent.

1. CORPORATION TAX — FOREIGN CORPORATIONS — CONDITIONS PRECEDENT TO JURISDICTION. The jurisdiction to tax foreign corporations under chapter 542, Laws of 1880, as amended by chapter 501, Laws of 1885, depends upon the existence of two concurring conditions, namely, that the corporation shall be "doing business in this state," and that its capital or some portion thereof shall have been "employed within this state."

2. FOREIGN INVESTMENT COMPANY — CAPITAL NOT EMPLOYED WITHIN THIS STATE. A foreign corporation, whose capital is wholly invested in the stock and bonds of an independent foreign corporation doing business wholly out of this state, whose whole income is derived from such investment, and which maintains a leased office, with furniture, officers and clerks, in this state, where it receives and distributes the dividends or income derived from its investment, which constitutes its whole business, is not subject to taxation under the act of 1880-1885, since, although it is "doing business in this state," no part of its capital is "employed within this state," within the meaning of the statute.

People ex rel. Railways Co. v. Roberts, 90 Hun, 474, reversed.

(Argued June 7, 1897; decided October 12, 1897.)

APPEAL from an order of the General Term of the Supreme Court in the third judicial department, entered December 21, 1895, which affirmed, on certiorari, a determination of the comptroller of the state of New York fixing and determin-

ing, upon a rehearing before him, a tax against the relator in pursuance of chapter 542, Laws of 1880, and the acts amendatory thereof.

The facts, so far as material, are stated in the opinions.

William D. Guthrie and *Carl A. de Gersdorff* for appellant. The relator is not "doing business in this state" within the meaning of the statute. (L. 1890, ch. 522, §§ 1, 3; *People v. Equitable Trust Co.*, 96 N. Y. 387, 394; *People ex rel. v. Wemple*, 129 N. Y. 558, 563; *People v. H. S. M. Co.*, 105 N. Y. 76; *S. C. O. Co. v. Wemple*, 44 Fed. Rep. 24; *People ex rel. v. Campbell*, 139 N. Y. 68.) The relator employs no part of its capital stock within the state of New York. (L. 1885, ch. 501, § 11; *People ex rel. v. Roberts*, 145 N. Y. 375; *People ex rel. v. Campbell*, 139 N. Y. 68; *People ex rel. v. Roberts*, 8 App. Div. 201; 151 N. Y. 619; *People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Wemple*, 150 N. Y. 46; *Demarest v. Flack*, 128 N. Y. 205.)

T. E. Hancock for respondent. The relator employed capital stock in the transaction of business in this state. (129 N. Y. 562; 133 N. Y. 323; *People ex rel. v. Roberts*, 149 N. Y. 572; *People ex rel. v. Roberts*, 91 Hun, 162; *People ex rel. v. Campbell*, 66 Hun, 147; *People ex rel. v. Roberts*, 152 N. Y. 59; *People ex rel. v. Campbell*, 138 N. Y. 543; *People ex rel. v. Com. of Taxes*, 23 N. Y. 224; *People v. Campbell*, 88 Hun, 548; *People ex rel. v. Roberts*, 82 Hun, 318; 147 N. Y. 699.) The relator was engaged in "doing business in this state." (*People v. H. S. M. Co.*, 105 N. Y. 83; 131 N. Y. 69; *People ex rel. v. Wemple*, 133 N. Y. 325; *People ex rel. v. Wemple*, 129 N. Y. 562; *People v. E. T. Co.*, 96 N. Y. 397; *People ex rel. v. Roberts*, 152 N. Y. 59.)

ANDREWS, Ch. J. The jurisdiction to tax foreign corporations under chap. 542 of the Laws of 1880, as amended by chap. 501 of the Laws of 1885, and the subsequent amendments, depends upon the existence of two concurring con-

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ditions, namely, that the corporation sought to be taxed shall be "doing business" in this state, and, second, that its capital or some portion thereof shall have been "employed within this state." (Chap. 501, Laws of 1885, sec. 11.) This point was sharply presented and expressly decided in *People ex rel. Hurlan and Hollingsworth Co. v. Campbell, Comptroller* (139 N. Y. 68). The relator in that case was a manufacturing corporation created under the laws of the state of Delaware, where it conducted its manufacturing operations, but having a rented office in the city of New York, in which it placed office furniture and which was in charge of a salaried agent. The office was maintained for the convenience of the corporation and its patrons. Meetings and conferences were held therein between the agent and persons contemplating entering into contracts with the corporation, but the contracts themselves when made were signed and executed at the home office in Wilmington. The relator was taxed upon the basis of \$25,000 of capital stock "employed in this state." It was claimed on behalf of the relator that it was neither "doing business" in this state nor employed any of its capital therein within the meaning of the statute. This court reversed the decision of the comptroller, Judge EARL writing the opinion. The court declined to pass upon the question whether the relator was "doing business" in this state within the meaning of the statute, but rested its judgment on the ground that no part of its capital was employed therein. Judge EARL said: "We leave this question (as to the relator's doing business in this state) unanswered, as we are satisfied that it did not employ any of its capital within this state, and that, therefore, there was no basis for the imposition of the taxes. As before stated, except the small amount of furniture in its office, it did not have or keep any property of any kind within this state, and it did not disburse any money in this state. The only obligations it incurred in this state were for the rent of the office and the salary of its agent, and they were discharged by checks drawn in the state of Delaware, on a Delaware bank, and paid in that state. Those checks were obliga-

tions of the relator, and not property in any sense belonging to it, and they were no portion of its capital. They operated as payments made in the state of Delaware, and there was no ground whatever for saying that it employed \$25,000 of its capital, or any other sum, within this state. We do not think that the office furniture could fairly be considered as capital employed within this state." (See, also, opinion of O'BRIEN, J., *People ex rel. S. T. C. Co. v. Wemple*, 133 N. Y. 323.)

While, in most cases, a foreign corporation doing business within this state will employ some portion of its capital in the prosecution of such business, it is quite possible that the business which it prosecutes here may not require the use of any part of its capital, and, when this is the case, there can be no taxation for the reason that there is no basis for taxation, since the basis for the tax is the "amount of capital stock employed within this state." Having in view the necessity of the coexistence of both of the conditions mentioned to warrant the imposition of a tax under the act of 1885, it is important to refer to the facts disclosed by the record. The relator is a corporation organized under the laws of New Jersey as an investment company with a capital of \$13,000,000, and is managed by a board of ten directors, two of whom only are residents of the state of New York. It has an office in Jersey City where meetings for the election of directors are annually held, and an office in the city of New York for which it pays an annual rental of \$1,500, containing office furniture of the value of \$1,000, and it pays salaries to a treasurer, secretary, clerk and stenographer employed in the city of New York, amounting to \$10,000 a year. The company seems to have been organized for the purpose of investing its capital in the purchase of the stock and bonds of the Union Stock Yard and Transit Company, an Illinois corporation, and its whole capital has been invested in the stock and bonds of that corporation. It has issued shares to its own stockholders to the full amount of its capital stock. Upon the purchase of the stock of the Illinois corporation, the relator deposited it with the Central Trust Company of New

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York, as collateral security for the payment of certain bonds issued by the relator. The organization and management of the Chicago corporation is independent of the relator. The relator's whole income is derived from its investment in the Chicago company. The entire business of that company is done at Chicago, and its dividends are declared and paid in that city. The dividends and income of the relator, arising from the investment in the Illinois corporation, are applied by it to the payment of the interest and principal of its obligations, the disbursements of the New York office and in paying dividends to its own stockholders declared, from time to time, by the directors at meetings in New York. These dividend checks are drawn upon banks in the city of New York and are there mailed to its stockholders, 1,500 in number. The relator keeps its bank account in that city, composed of a portion of its dividends and income, and has an average balance of \$25,000 or \$30,000 to its credit, and it has constituted the Bank of Commerce its transfer agent there.

There is no controversy as to the fact that in the transaction of its business in this state, the relator has and employs no money for any purpose, except that derived in the form of dividends or interest from its investment in the stock and bonds of the Illinois corporation. Its whole capital remains invested out of this state and it applies the income therefrom in the manner hereinbefore stated. It may be conceded that the relator in keeping an office in the city of New York, where it received and disbursed its income derived from its investment in the Illinois corporation, depositing it in bank and drawing upon the deposit for the payment of its obligations, dividends to its shareholders and disbursements in maintaining its office, was doing a part of its appropriate function as an investment company, and that this was "doing business within this state" which satisfied that condition of the statute. But the uncontroverted evidence establishes that it employed no part of its capital here, and the second condition to the exercise of the taxing power under the act of 1885 did not exist. The profits and earnings of a corporation are not

capital, though they may be converted into capital. If no such conversion has taken place, they furnish no basis for taxation under the act of 1885, except incidentally as the dividends may be increased, upon which the tax in many cases is computed. The point that the profits or surplus earnings of a foreign corporation are not capital and not taxable under the statute, was distinctly decided (following prior decisions) in the recent case in this court of *People ex rel. Singer Mfg. Co. v. Wemple* (150 N. Y. 46), and the peculiar facts render the case very significant in respect of the application of the principle stated. There can be no claim in this case that the income of the relator received from the Illinois corporation and disbursed in New York city, was converted into capital. It is doubtless true that the income from its investment in the Illinois corporation, when received, was the property of the relator within this state. But it was not capital, but the profits from capital. If the disbursement of the income by the relator for the purposes and in the manner stated, can in any proper sense be considered an employment of the money within this state, it is, nevertheless, true that it was not an employment of capital and hence was not a fulfillment of the second condition precedent to the jurisdiction to tax the relator, namely, that it should have employed its capital or some part thereof within this state. We perceive no ground upon which the tax imposed upon the relator can be maintained. The small amount invested in office furniture and the fact that it rented an office in the city of New York and held it under lease, did not alone justify the imposition of the tax, in view of two decisions of this court. (*People ex rel. H. & H. Co. v. Campbell, supra*; *People ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201; *affd.*, 151 N. Y. 619.)

We think the decision of the comptroller and the order from which this appeal is taken should be reversed.

GRAY, J. A careful consideration of this appeal leads me to concur with the chief judge. Chapter 542 of the Laws of

1880, as amended by chapter 501 of the Laws of 1885, prescribes, in its third section, that every corporation organized under the laws of any other state, "and doing business in this state," shall be subject to a tax. Section eleven prescribes that "the amount of capital stock which shall be the basis for tax under the provisions of section three of this act * * * shall be the amount of capital stock employed within this state." It is too clear for argument that it is not sufficient that a foreign corporation shall be merely doing business in this state, in order to subject it to taxation, and the condition must exist that its capital stock, or some part of it, is employed within this state. If that condition is not met by the facts of the case, then the basis, which the law assumes as justifying the imposition of the tax, does not exist. This proposition is not disputed; but it is argued that in the present case the relator did employ its capital within this state, because its business was done here, viz., the business of looking after the investment made of its capital in the purchased shares of stock of the Illinois corporation. Whether the relator was doing business here, or what that business may have been, I do not consider important to discuss. The fact is that the whole capital of the relator had already been employed in the purchase of the shares of the Illinois corporation, and remained so invested. All that was done by the relator at its New York office was to receive and distribute the dividends, or income, from the Illinois investment. The intention of the legislature was, undoubtedly, to compel foreign corporations, when employing their capital within this state in the conduct of their business, to pay a tax in return for the privilege of doing so. Such a policy is justifiable and should be given the fullest effect by the courts; but, unless the condition in fact exists, which the statute contemplates, there can be no ground upon which to predicate a liability to assessment.

I think it would be straining the law beyond its capacity for construction to hold, where there has been an employment of its capital stock by a foreign corporation, as in the present case, in a business investment without the state, that in the

maintenance of an office within the state for purposes of convenience in the distribution of the money proceeding from its foreign investment, there had been an employment of capital here. Its capital is not here in any sense. The relator may be here itself for many corporate purposes; but it was not here for any purpose connected with an employment of its capital stock.

I think this case fairly falls under the authority of the *Harlan & Hollingsworth Case* (139 N. Y. 68), and I agree with the chief judge in his reasoning and in the conclusion that the determination of the comptroller was erroneous and that there should be a reversal of the order appealed from.

VANN, J. (dissenting). The relator is a corporation organized in the state of New Jersey, where its principal office is located, which, however, is used only for the purpose of holding the annual meetings of stockholders to elect directors and the annual election of officers by the directors. Its main office is in the city of New York, where all its ordinary business is carried on and all corporate acts done which create an income for division among its stockholders. Its business is making investments, not for others but for itself. Its capital stock is \$13,000,000, divided into 130,000 shares of \$100 each, all of which has been issued, one-half being preferred and the other half common. Its annual dividends amount to \$910,000, or at the rate of six per cent on the preferred and eight per cent on the common stock. The only investment that it has thus far made is in the stock and bonds of an Illinois corporation, known as the Union Stock Yard & Transit Company, which carries on the business of "yarding" and feeding horses, cattle, sheep and hogs as they are brought by different railroad companies into the city of Chicago. "The motive for the organization" of the relator, as stated by its treasurer, "was this: The stock of the Chicago company was held by comparatively a small number of stockholders and had become very valuable. It was looked upon as a profitable investment, and an entirely separate and different body of men formed

the project of purchasing that entire stock and eliminating the old holders and passing the ownership of it into a corporation, which should be formed with its own capital for the express purpose of holding and owning that stock alone, the assumption being that the stock should be purchased from the individual holders of the Chicago company's stock at a price that would afford a fair return upon the larger capitalization of the new company."

When the relator was organized it purchased nearly all of the stock of the Chicago company, which was held in several different states, and pledged some of the certificates to the Central Trust Company of New York to secure an issue of bonds amounting to \$10,000,000, bearing interest at the rate of five per cent, and deposited the remainder in New York city for safekeeping. The relator has nothing to do with the business of the Chicago company, which manages itself, transacts its own affairs and earns its own profits, but when the latter company declares a dividend, the portion to which the relator, as a stockholder, is entitled, is transmitted to New York, and a part of the proceeds, \$500,000, is used to pay the interest on the bonds, a part, \$58,000, to retire that amount of the principal of some income bonds, while the remainder, \$910,000, is distributed in dividends among the relator's stockholders. Thus the entire business of the relator is buying the stock of another company, caring for the investment, receiving the dividends, paying its debts and distributing its profits. It does not earn money by making and selling articles, like a manufacturing corporation, nor lend its capital, like a banking corporation, but simply invests its capital in the stock of another corporation, looks after its investment and enjoys the profits. That is its sole business, which is substantially all carried on in the city of New York, where it rents an office at \$1,500 a year, has furniture worth \$1,000, an average bank account of \$25,000 or \$30,000; a treasurer, secretary, bookkeeper and stenographer, whose annual salaries aggregate the sum of \$10,000. The value of the lease does not appear. The directors hold their business meetings in New York city,

the dividends payable to it are received there, and the dividends paid by it are declared and distributed there. Fifteen hundred different checks are required to make the distribution. The only tax that this prosperous company pays, so far as appears, is the very moderate franchise tax required by the laws of the state of New Jersey. When the comptroller, under the authority of chapter 542 of the Laws of 1880, as at various times amended, appraised the value of its capital stock employed within this state at the sum of \$52,500, for the purpose of taxation upon its business, it felt aggrieved, and caused a writ of certiorari to be issued that brought the subject before the Supreme Court for review, and its appeal from the determination of that court sustaining the action of the comptroller now brings the subject before us.

The object of the statute under which the tax in question was laid is to raise money for the use of the state by imposing a specific tax upon the corporate franchises of domestic corporations and upon the business of foreign corporations done in this state. (L. 1880, ch. 542; L. 1881, ch. 361; L. 1882, ch. 151; L. 1885, ch. 501; L. 1890, ch. 522; L. 1894, ch. 562; *People v. Equitable Trust Co.*, 96 N. Y. 387.) So far as applicable to the case in hand, the tax is imposed on corporations doing business in this state upon the basis of the amount of capital stock employed within the state. (*People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558.) As was said by this court in a recent case: "The intention of the legislature is that, when foreign corporations employ their capital in carrying on a business within this state, they must pay a tax to the state in return for the privileges and benefits they enjoy." (*People ex rel. Badische Fabrik v. Roberts*, 152 N. Y. 59, 63.)

Two questions, therefore, arise for decision: (1) Whether the relator was doing business in this state, and (2) what amount of its capital stock was employed within this state.

It was not engaged in business in the state of New Jersey, where it was organized, for the election of directors and officers is not doing business within the meaning of the statute,

but simply appointing agents to do business. Nor was it engaged in business within the state of Illinois, for it neither managed nor had the right to manage the business of the Union Stock Yard & Transit Company, of which it was the chief stockholder. The business of that corporation was not its business, for it could not directly control the smallest detail thereof. The capital of that corporation was not its capital, for it could not invest a dollar belonging to it. The property of that corporation was not its property, even to the smallest fractional part, for it could not dispose of it, nor take possession of it, nor control it in any way. Its only power was the power of a stockholder, who can neither bind nor loose the corporation whose stock he holds. The relator does not claim to have been doing business in any state other than New Jersey and Illinois, and, if we have reasoned correctly, it was not doing business in either of those states, yet, as it was a business corporation, it must have been doing business somewhere. Where was it? Some confusion has arisen from the peculiar nature of its business, which was not that of making, buying or selling tangible things, or lending money, or rendering services to others, but was the investment of its own capital, caring for the investment, collecting and dividing the proceeds. Thus it was, so to speak, an incorporated gentleman of leisure. While an individual who simply invests his money and collects the profits is not regarded as a business man, there is no escape from the fact that the relator was a business corporation, engaged in business in some state, and as nearly every business act that it is shown to have ever done, aside from some of the purchases of stock, was done in the state of New York, I think it was doing business in this state within the meaning of the statute.

But, did it employ capital within this state? Here, again, the peculiar nature of its business must be resorted to for an answer to the question. The business, although large in amount, was limited in scope, but all of it, or substantially all of it, was done from the New York office. After the original investment was made, over four years ago, its business was to

look after that investment. That was done in the city of New York, where the certificates of stock were kept, the dividends thereon received and divided, the interest and principal of the funded debt paid, an office rented, furnished and occupied, officers and agents employed and paid, a bank account kept, and where the substance of all the business that was done at all was transacted. A corporation can only do business through officers and agents, and those who have the active management of its affairs are ordinarily paid for their services. The only officers or agents of this large corporation who were paid, so far as appears, discharged their duties in the New York office. The directors held their meetings there, except the first each year, which was for the purpose of organization. All their business meetings were in New York. In fine, substantially all the corporate acts, delegated or otherwise, which directly resulted in the receipt of money to be divided in dividends, so far as the record discloses, were done in this state. Nothing of importance appears to have been done in the state of Illinois, for the money used to buy the original stock of the Chicago corporation belonged to it as soon as the purchase was made, and that company thenceforward owned it and controlled it, and the relator had no voice in the management of its affairs except indirectly through its right, as a stockholder, to vote for directors. Can the act of voting for directors be properly termed the carrying on of business or the employment of capital? Yet that is about all that the relator did in the state of Illinois. Its capital was employed where its business was done, not the business of some other corporation, and its business of looking after its investment was done in the state of New York. The statement that its capital stock was invested in business in Chicago is misleading, for it had no capital stock invested in business there. Its capital stock was invested in certain shares of stock of a company that invested its capital stock in business in Chicago. There is a distinction between capital stock and shares of stock. As was said by Judge FINCH in a late case: "The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of

the company is simply its capital, existing in money or property, or both ; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character ; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation ; the other to the corporators." (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 437.)

What money or property, which alone, as thus held, constitute the capital stock of a corporation, did the relator have in Illinois ? None, clearly, and, therefore, it had no capital stock employed there. What money or property did it have in the state of New York ? It had all but two per cent of the shares of stock issued by the Chicago company. It also had, as it alleged in its petition, bonds of that company to an amount not stated, besides a bank account averaging nearly \$30,000, with a furnished office where it carried on its business. It had no property in any other state, and no money except some on deposit in one or two foreign banks.

The Chicago company owned its capital stock, consisting of property and money, but the relator owned substantially all of the shares of stock issued by that company, and those shares of stock constituted its own capital stock. It did not own and could not control or manage the property which constituted the capital stock of the corporation in Chicago, and hence was not engaged in business there, but it did own, control and manage the shares of stock issued by the Illinois corporation. That management and control, which constituted its business, were exercised by it in the city of New York. There is where it carried on its business of taking care of its investments, and there is where, within the meaning of the statute, its capital stock was employed, at least to the amount of the valuation made by the comptroller. *Non constat* the value either of its lease, or of the bonds owned by

it, warranted that valuation. But, to quote from Judge GRAY in another case, "the average monthly balances in the New York banks, and the expenditure for salaries and other matters connected with the maintenance of its office in New York city" were a sufficient basis for the assessment. (*People ex rel. A. C. & D. Co. v. Wemple*, 129 N. Y. 558, 562.) A bank account that is used to carry on the business of an "investment" corporation in this state, to pay its office rent, salaries and clerk hire, to purchase office furniture, stationery and postage stamps, and to defray many incidental expenses connected with the transaction of its business, may properly be considered by the comptroller in the discharge of his duties. I think that the relator was subject to taxation under the act in question, that it has not been overtaxed, and that the order appealed from should be affirmed, with costs.

ANDREWS, Ch. J., and GRAY, J., read for reversal; O'BRIEN and BARTLETT, JJ., concur; VANN, J., reads for affirmance, and HAIGHT and MARTIN, JJ., concur.

Order reversed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK INSTITUTION FOR THE BLIND, Respondent, v. ASHBEL P. FITCH, Comptroller of the City of New York, Appellant.

1. CHARITABLE INSTITUTIONS—SUPERVISION OF STATE BOARD OF CHARITIES. It is not necessary that an institution should be wholly charitable to fall within the provisions of the Constitution (Art. 8, §§ 11–15) and the statutes (L. 1895, chs. 754, 771) placing charitable institutions under the supervision and rules of the state board of charities. It is enough if the institution is partly charitable in its character and purpose.

2. EDUCATIONAL AND CHARITABLE INSTITUTION. The mere fact that an institution is partly educational does not exclude it from the provisions of the Constitution and statutes placing charitable institutions under the supervision and rules of the state board of charities. If an institution is both educational and charitable, it falls within those provisions.

3. INSTITUTIONS FOR INSTRUCTION OF THE BLIND. The fact that institutions for the instruction of the blind are subject to the visitation of the superintendent of public instruction (L. 1894, ch. 556, tit. 15, art. 14) does not prevent such an institution from being charitable in its character and

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purpose, and, hence, also subject to the visitation of the state board of charities (Const. art. 8, § 13).

4. MEANING OF "CHARITABLE." The word "charitable," as used in the provisions of the Constitution and the statutes subjecting charitable institutions to the supervision and rules of the state board of charities, is to be given only its usual and ordinary meaning.

5. INSTITUTION FOR THE BLIND—CHARITABLE IN PART. The New York Institution for the Blind, an institution under private control, organized in 1831 (Ch. 214) for the special education of the blind, is to be regarded as a charitable institution so far as it clothes, educates and maintains indigent pupils at public expense or by donations from individuals; and as to such pupils, it is subject to the supervision and rules of the state board of charities.

6. INSTITUTION EDUCATIONAL IN PART. Such institution, so far as it educates pupils who pay for their tuition, board and maintenance, is not to be regarded as a charitable, but only as an educational institution, and as to those pupils the board of charities has no jurisdiction or power of supervision.

7. INSTITUTION OF CHARITABLE CHARACTER. Such institution, being to an extent charitable as well as educational, falls within the provisions of the Constitution and statutes as an institution of a charitable character or design.

8. STATE MAINTENANCE OF FREE EDUCATION. The provision of the Constitution (Art. 9, § 1), that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated," relates only to the public or common schools of the state, and has no application to appropriations made by the state to an institution for the education of the blind, wholly or partly under private control.

9. STATE AID TO PRIVATE EDUCATION OF THE BLIND. Appropriations by the legislature to a local or private institution, for the education and support of the blind, are based upon and authorized by the provisions of the Constitution (Art. 8, § 10 of 1874; § 9 of 1894) which prescribe that the prohibition of state aid to any association, corporation or private undertaking shall not prevent the legislature from making such provision for the education and support of the blind as to it may seem proper.

10. PAST APPROPRIATIONS NOT VIOLATIVE OF THE CONSTITUTION. It does not follow that, if the New York Institution for the Blind is charitable, appropriations made to it in the past by the state for the education and support of pupils, and appropriations made by the counties of New York and Kings (under L. 1870, ch. 166, § 3) of the sums required for clothing the indigent pupils who were residents of the county making the appropriation, were violative of the Constitution (Art. 8, §§ 8, 11, of 1874).

11. MANDATORY APPROPRIATION. The charitable character of the New York Institution for the Blind is not changed if the provisions of the stat-

ute (L. 1870, ch. 166, § 3) requiring the counties of New York and Kings to appropriate money to clothe indigent pupils is mandatory, and hence in conflict with the Constitution of 1894 (Art. 8, § 14), which is not decided.

12. PARTICIPATION IN PUBLIC SCHOOL FUND. It does not follow from the fact that the charter of Greater New York (L. 1897, ch. 378, § 1161) authorizes the board of education to distribute a ratable proportion of the school fund to every pupil in the New York Institution for the Blind, that the institution must be regarded as purely educational and not charitable.

13. PUBLIC PAYMENTS TO CHARITABLE INSTITUTIONS. The legislature cannot now authorize a locality to pay, nor can a locality in any case pay, its money to a charitable institution, wholly or partly under private control, for the care, support and maintenance of inmates who are not received and retained pursuant to the rules established by the state board of charities. (Const. 1894, art. 8, § 14.)

14. PAYMENT DEPENDENT UPON OBSERVANCE OF RULES OF BOARD OF CHARITIES. The New York Institution for the Blind being, to an extent, a charitable institution and, so far as it is charitable, subject to the visitation and rules of the state board of charities, no payment can be properly made to it from the moneys of the city and county of New York for the maintenance or support, including clothing, of any indigent inmate not received and retained by it pursuant to the rules of that board.

People ex rel. Inst. for the Blind v. Fitch, 12 App. Div. 581, reversed.

(Argued June 7, 1897; decided October 12, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department entered January 4, 1897, affirming an order of the Special Term which granted a peremptory writ of mandamus requiring the comptroller of the city of New York to audit and pay the claim of the relator for clothing furnished its inmates who resided in the city and county of New York.

The facts, so far as material, are stated in the opinions.

T. E. Hancock and *Francis M. Scott* for appellant. The relator is a charitable institution. Its status has been construed and decided by the courts. (*N. Y. Inst. for Blind v. How*, 10 N. Y. 84; *Riker v. N. Y. Hospital*, 66 How. Pr. 246; L. 1831, ch. 214; L. 1834, ch. 316; L. 1836, ch. 226; L. 1839, ch. 200; L. 1848, ch. 193; L. 1852, ch. 333; L. 1853, ch. 219; L. 1867, ch. 744; L. 1870, ch. 166; L.

1895, ch. 754; L. 1894, ch. 556; L. 1863, ch. 135; L. 1864, ch. 280; L. 1866, ch. 774; L. 1869, ch. 645; L. 1870, ch. 281; L. 1871, ch. 718; L. 1891, ch. 86.) The distinction drawn by the trial justice is manifestly arbitrary and fanciful, and in contravention of the purpose and design of the framers of the Revised Constitution. (L. 1867, ch. 591; L. 1873, ch. 571; L. 1895, ch. 771; L. 1896, ch. 546; *People ex rel. v. Roberts*, 148 N. Y. 365; *Jackson v. Phillips*, 14 Allen, 556; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Russell v. Allen*, 107 U. S. 163; *Vidal v. Gerard*, 2 How. [U. S.] 127; *Chapin v. School District*, 35 N. H. 445; *Gerke v. Purcell*, 25 Ohio, 243; *Owens v. Missionary Soc.*, 14 N. Y. 398.) The functions of the superintendent of public instruction toward the relator do not exclude the jurisdiction of the state board of charities. (Const. N. Y. art. 8, § 13; L. 1839, ch. 200, § 6; L. 1855, ch. 539; L. 1860, ch. 464; L. 1862, ch. 351, § 2; L. 1867, ch. 744, § 22; L. 1870, ch. 166, § 3.)

John M. Bowers for respondent. The New York Institution for the Blind is not of a charitable, eleemosynary, correctional or reformatory character, and, therefore, is not subject to the visitation of the state board of charities, and is not subject to the portion of section 14 of article 8 of the Constitution providing that payments by counties, cities, etc., to charitable, eleemosynary, correctional and reformatory institutions wholly or partly under private control for care, support and maintenance may be authorized, but shall not be required by the legislature, and providing that no such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. (*Asylum v. Phœnix Bank*, 4 Conn. 177; *Angell & Ames on Corp.* 29; *Dartmouth College v. Woodward*, 4 Wheat. 640; *Williams v. Williams*, 8 N. Y. 532.) Under the Constitution of 1894 the legislature may appropriate money for the education of persons in the New York Institution for the Blind, although such persons are not received and retained pursuant to rules made by the

state board of charities. (Const. N. Y. art. 8, § 9; *Shepherd's Fold v. Mayor, etc.*, 96 N. Y. 137; *Hoey v. Gilroy*, 129 N. Y. 138; *Townsend v. Little*, 109 U. S. 504; *Standon v. Oxford University*, W. Jones, 96; *Churchill v. Crease*, 5 Bing. 180; *De Winton v. Brecon*, 26 Beav. 533; *State v. Trenton*, 38 N. J. L. 68.) The intent of the Constitution was to subject alone institutions distributing alms for the support and maintenance of the poor to the visitation of the state board of charities. It was not the intent of the Constitution to subject educational institutions to the supervision of such board. (Const. N. Y. art. 9, § 1.) The acts of the legislature of the state of New York are in strict accord with our contention. (L. 1895, ch. 771; L. 1894, ch. 556; L. 1896, ch. 546, art. 1, § 2.) The enactment of chapter 193 of the Laws of 1848, authorizing the performance by the relator of charitable work, and the subsequent repeal of such statute, are conclusive as to the present status of the relator. (L. 1848, ch. 193; L. 1859, ch. 278; L. 1862, ch. 411.)

MARTIN, J. The question presented in this case involves the consideration and construction of certain provisions of the Constitution and of the statutes by which the relator was organized and continued, and by which it has been supported and the management of its affairs controlled.

These provisions of the Constitution are new, having gone into operation on the 1st day of January, 1895. So far as applicable here they provide: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper." (Art. 8, § 9.)

"No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any associa-

tion or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law." (Art. 8, § 10.)

Section eleven of article eight provides for a state board of charities, which shall visit and inspect all institutions of a charitable, eleemosynary, correctional or reformatory character, except those for the insane and adult criminals.

Section thirteen provides that the visitation and inspection provided for therein shall not be exclusive of other visitation and inspection (then) now authorized by law.

Section fourteen declares: "Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the legislature by general laws."

After the adoption of the amended Constitution, the legislature enacted a statute which, in substance, authorized the administrative boards or officers of counties, towns and municipalities, in their discretion, to appropriate and pay to charitable, eleemosynary, correctional or reformatory institutions, wholly or partly under private control, for the care, support and maintenance of inmates, but to be made only for such as

were received and retained pursuant to rules established by the state board of charities. (Laws 1895, ch. 754.)

In the same year the legislature passed an act to revise and consolidate the laws relating to that board, which, in substance, declared that it should be its duty to visit, inspect and maintain a general supervision of all institutions, societies or associations which were of a charitable, eleemosynary, correctional or reformatory character, whether state or municipal, incorporated or not incorporated, which were made subject to its supervision by the Constitution ; that the institutions subject to its supervision should include all institutions, societies and associations which were of a charitable, eleemosynary, reformatory or correctional character or design, and that institutions for the deaf and dumb and blind should be subject to such visitation and inspection by the state board of charities as the Constitution provides. (Laws 1895, ch. 771, §§ 2, 9, 11.)

It is upon these provisions of the Constitution and statutes that the appellant relies. His claim is that, as the inmates of the relator were not received or retained by it pursuant to the rules established by the board of charities, it was not entitled to the relief which has been awarded. That the relator was wholly or partly under private control, and that the inmates for whose clothing it seeks to recover were not so received or retained, are admitted.

This court has already held that the provisions of the Constitution relating to this subject operated presently, so that from the time rules were established by the state board of charities no payments for inmates not received or retained in pursuance thereof would be justified. (*People ex rel. Inebriates' Home v. Comptroller*, 152 N. Y. 399.)

Indeed, it is practically conceded by both parties that if the relator is a charitable, eleemosynary, correctional or reformatory institution, the decisions of the courts below were incorrect and the orders appealed from should be reversed. That it is either a correctional or reformatory institution is claimed by neither. Thus, the single question to be determined by

this court is whether the relator is a charitable or eleemosynary institution.

To a proper understanding of that question it is necessary to ascertain the nature of the New York Institution for the Blind and the purpose for which it was organized and continued. To that end, a brief history of its organization, the management of its affairs, the manner in which it has been supported, and the class of persons who have been its inmates, seems to be required.

In 1831, Dr. Ackley, who had previously been active in organizing and carrying into operation institutions for the education of the deaf and dumb, turned his attention to the matter of the instruction of the blind. Associating with himself a number of other benevolent gentlemen, they sought to establish an institution wherein the unfortunate blind might be educated, and at the same time learn some useful trade or business by which to obtain a livelihood in after years. With this object in view, they procured the institution of the relator to be organized under and by chapter 214 of the laws of that year. The purpose of its organization, as stated in that act, was the instruction of children who were born blind or might have become so by disease or accident, and it required the institution to apply its funds or property to that purpose alone. Its first work seems to have been commenced that year in a small room in Canal street, where children taken from the almshouse were instructed under the control of Dr. John D. Russ, who remained in charge of the institution until its utility was established. Its first president was Samuel Ackley, and there were associated with him, as managers and officers of the institution, gentlemen whose known philanthropy was such as to show quite plainly that the purpose of the institution was a benevolent one, and that it was not intended to be one of profit to the corporators. Although the education of the blind had previously been, to some extent, successfully attempted in Europe, the relator seems to have been a pioneer in that work in this country. An institution had been organized in 1829 in Massachusetts, through

the exertions of Dr. John D. Foster, under the name of the "New England Asylum for the Blind," which was subsequently known as the "Perkins' Institution and Massachusetts Asylum for the Blind," but it was not opened until 1832. It was first under the charge of Dr. Samuel D. Howe, who commenced in a private house on Pleasant street in the city of Boston with six pupils. In 1833 a similar institution was organized in Philadelphia through the efforts of Robert Vaux. Thus, the idea of organizing special institutions for the instruction of the blind seems to have occurred to humane and benevolent persons in New England, New York and Philadelphia at about the same time, and without any apparent concert of action. All these institutions were organized and carried into operation through the efforts of the benevolent, and to accomplish a work of charity that had hitherto been neglected in this country.

In 1834 (Chap. 216) the relator was authorized to receive four indigent blind persons from each "senate" district in like manner and at like expense to the state as provided by law for the indigent deaf and dumb. Such indigent blind persons, besides their literary or school education, were to be instructed in some trade or employment taught and carried on in the institution.

At that time the deaf and dumb were furnished with board, lodging and tuition for which the state paid the institution in which they were maintained and educated. (Chap. 234, Laws of 1822; chap. 170, Laws of 1830.)

In 1836 (Chap. 226) twelve thousand dollars was appropriated to be paid to the relator to purchase in fee simple the two acres of ground occupied by it and to defray the expenses of repairing the buildings thereon, the conveyance to be made to the state, and it was to receive from each "senate" district four indigent blind persons in addition to the number then supported by the state to be supported in like manner and at like expense. In the same year, by chapter 399, the preceding statute was amended and partially repealed. It made the appropriation of twelve thousand dollars subject to the

condition that the managers should raise eight thousand dollars, which, with the twelve thousand dollars, was to be applied to the purchase of the premises occupied by the relator, to the erection of a workshop, and to repair the buildings thereon. It then provided that the title should be vested in the managers, but that the premises so purchased should be used by them solely for the benefit of the blind and as provided by the third section of chapter 226, which required the managers to receive from each "senate" district four indigent blind persons in addition to the number then supported by the state. The managers were required to report to the legislature each year.

In 1839 (Ch. 200) the relator was authorized to receive from each "senate" district eight additional indigent blind persons, to be educated and maintained in the same manner as provided in the previous statutes, and the sum of fifteen thousand dollars was appropriated to be paid in three annual installments, upon condition that the managers should raise ten thousand dollars, which sums were to be applied to pay for the labor and materials necessary to complete the structure upon the premises and to remove the old buildings thereon. It also provided for clothing such pupils by the counties from which they were sent, the amount not to exceed twenty dollars for each pupil.

In 1841 (Ch. 175) the legislature appropriated to the relator the sum of five thousand dollars for the purpose of leveling and grading the grounds belonging to it, providing necessary fixtures, and erecting and completing a wing to the main building, on condition that the relator should raise the sum of seven thousand dollars to be applied to that purpose.

In 1845 (Ch. 58) there was appropriated to the relator the sum of twenty-five thousand dollars, five thousand dollars to be paid annually for the period of five years, and the managers were required to report under oath to the legislature as to the expenditure of the money so appropriated.

In 1848 (Ch. 193) the act of 1831, organizing the relator, was amended by adding, "and also for the purpose of afford-

ing an asylum and employment for other blind persons." By the same act the legislature appropriated to the relator the sum of fifteen thousand dollars to be applied to the erection of work shops and other necessary buildings for providing an asylum and employment for the adult blind.

In 1852 (Ch. 333) the act incorporating the relator was continued, and it was provided that it should receive from each "senate" district four indigent blind persons to be maintained and educated at the expense of the state, the indigent blind persons then in the institution to form a part of the number to be admitted under that act.

In 1859 (Ch. 278) it was provided that the relator might sell or convey its real estate in the city of New York between Thirty-third and Thirty-fourth streets and Eighth and Ninth avenues, when the managers deemed it expedient; that one hundred thousand dollars of the amount received should be invested upon bond and mortgage, eight thousand dollars applied equally to the immediate relief of certain of the adult blind in the institution, the residue expended in the purchase of other real estate for the use of the institution and the erection of suitable buildings, and that any balance should be invested in stocks of the state, or of the cities of Brooklyn or New York for the benefit and use of the relator.

In 1853, \$16,640 was appropriated for the instruction of one hundred and twenty-eight pupils in that institution.

And an examination of the various supply bills passed each year from 1853 to the present time, discloses appropriations of from ten to fifty thousand dollars made in nearly every year for the support of the indigent inmates of the relator, and that they were generally made under the title of appropriations for charitable institutions.

In 1867 (Ch. 744) the New York State Institution for the Blind at Batavia was established and a general scheme for the care and education of the blind was inaugurated. By that statute the relator was to continue to have the custody, charge, maintenance and education of the pupils intrusted to it by the state, to be compensated as before, and to receive the

same amount from the counties for clothing, until the state institution should be ready to receive pupils, when a portion of them was to be transferred to it. The relator, however, was to retain and to continue to receive all pupils from the counties of New York and Kings, to be maintained and educated by it, and to be compensated by the state for their maintenance and education, and for their clothing by the counties from which they were sent.

In 1870, an act amending the act incorporating the relator authorized it to receive all such blind persons from New York and Kings between the ages of eight and twenty-five years as the superintendent of public instruction should appoint and the managers should deem of sufficient character and capacity for instruction, who were to be maintained, educated and supported by the relator at the expense of the state, with a provision authorizing and directing the supervisors of those counties where, in the opinion of the superintendent, the parents or guardians were unable to furnish them with suitable clothing, to annually raise and appropriate fifty dollars for each pupil, to be paid to the institution and applied in furnishing them therewith.

When the relator's claim arose, article fourteen of title fifteen of the Consolidated School Law (L. 1894, ch. 556) provided that all persons possessing the necessary qualifications, who were residents of New York, Kings, Queens, Suffolk, Richmond, Westchester, Putnam and Rockland counties, should be sent to the institution of the relator; that their board, lodging and tuition should be paid by the state; that appointments to the institution should be made by the superintendent of public instruction, and where, in his opinion, the applicants were able to bear a portion of the expense, he might impose conditions by which some share of the expense of clothing and education should be borne by their parents, guardians or friends.

The period of instruction for such pupils was five years, but it might be extended to not exceeding eight.

During the first thirty-nine years of its existence, the whole number of pupils received by the relator was one thousand and one, being an average of about twenty-six a year. Assuming that each remained in the institution the full term of five years, the average number of pupils in the institution was one hundred and thirty, and about the same number as there were of the indigent blind, who were, before 1870, educated by the relator at the expense of the state. There are now in the institution one hundred and seventy-seven pupils, thirty of whom are residents of the state of New Jersey, and the remainder are from the counties of New York, Kings, Queens, Suffolk, Rockland and Richmond. Of these ninety-five are from New York, and the bill presented by the relator for clothing shows that eighty-eight were indigent pupils, and hence that all the pupils in the institution from the county of New York, except seven, were indigent pupils, educated, maintained and clothed by the state and county.

An examination of the history of the relator, of the statutes organizing and continuing it, and the statutes relating to the management of the affairs of its institution, including the manner of its support and the class of persons who became its inmates, shows that the purpose of its organization was a benevolent one, and that during nearly the entire time, from its organization to the present, it has been supported, and its property purchased and maintained mainly by appropriations made by the state, and that it has been treated and regarded as one of the charitable institutions therein. Indeed, that its purpose was a benevolent one was practically admitted by Mr. Waite, who for many years has been the superintendent of the relator, as in his report for the year 1887 he in substance said that experience had proved that these schools were essential to the well-being of society, and that private philanthropy and public policy could find no work more beneficent and wise in which to unite.

The relator is, doubtless, to an extent, an educational institution. But that fact alone does not justify the conclusion that it is not a charitable institution within the meaning and

intent of the Constitution and statutes. An institution may be in a sense educational and at the same time be wholly or partly charitable, as the education and maintenance of indigent pupils, while being educated, may be the subject of charity as well as support alone. An institution may be both educational and charitable, and if so, it falls within the provisions of the Constitution and statutes, as it is to be observed that the provisions are that the board of charities shall visit and inspect all institutions which are of a charitable character or design, and, hence, to fall within that description, it is not necessary that the institution shall be wholly charitable. It need only be an institution which is wholly or partly charitable in its character and purpose.

Nor is the fact that institutions for the instruction of the blind are made subject to the visitation of the superintendent of public instruction controlling in determining this question. It may be conceded that this institution is partially educational and subject to the visitation of the superintendent of public instruction, and yet by no means follow that it is not an institution which is charitable in its character and purpose, and, therefore, also subject to the visitation of the board of charities, as the Constitution provides that the visitation by the board of charities is not exclusive of any visitation then provided by law, which would clearly include the visitation by the superintendent of public instruction.

The obvious purpose of the legislature in incorporating and continuing the relator, as well as in appropriating the money of the state to the purchase of its real estate, to the erection of its buildings thereon, and to the support of its indigent inmates, was to aid in providing for the education of the unfortunate blind, and, so far as necessary, to aid in supporting and maintaining them, at least while acquiring an education. A need existed on the part of these afflicted people for an education, if one could be acquired. To accomplish this, special schools employing special methods and special appliances were required. Without the assistance of the state, or the benefactions of individuals, it could not be obtained. To

supply this necessity, the relator was organized, and the expense of the education of its pupils was defrayed by the state and private contributions, as will be seen from the statutes referred to and the decisions of our courts in relation to bequests to it. (*N. Y. Institution for the Blind v. How's Executors*, 10 N. Y. 84; *Riker v. Society of the N. Y. Hospital*, 66 How. Pr. 246, 254.) It seems quite plain that an institution thus organized and maintained must be regarded as one of a charitable character within the intent and meaning of the Constitution and statutes.

That the New York Institution for the Blind was regarded by the framers of the present Constitution as a charitable institution, as well as educational, is manifest. The attention of the legislature and of the people had been previously called to the subject of the appropriation of the money of the state to the support of the deaf and dumb and blind. In 1891, Superintendent Draper called especial attention to the fact that more than \$262,000 was annually appropriated to the support of these institutions, that the supervision of the state over them was inefficient, and then observed: "The unadvisedness of expending so much money from the state treasury without close state supervision, cannot anywhere be questioned." It is quite obvious that this with other similar suggestions, the discussion of the subject by the public press, and the numerous petitions presented, called the attention of the convention to the necessity for a closer and more efficient supervision of these institutions. This was a subject which, in the language of the president of the convention, "deeply agitated the minds of the people of the state," and led the convention to the adoption of the provisions under consideration. The president, in stating what had been accomplished by the convention, among other things, said: "Besides that, we have secured the regulation of the State Board of Charities to this effect: That wherever any public money is devoted to a private charity for the public service, it shall continue under public control, and the vigilant eye and the strong arm of the people shall be able to follow every dollar of the public

money into every institution to which it is so devoted." Again, when we refer to the debates of the convention upon the subject, they show that it was its plain intent to include the relator among the charitable institutions of the state. While referring to the question of the jurisdiction of the state board of charities under the present Constitution, Mr. Lauterbach, who was chairman of the committee on charities, expressly stated that it would have jurisdiction of two institutions for the blind, obviously meaning the relator and the state institution at Batavia, as there seems to be no other in the state.

The arrangement of the provisions of the Constitution, as well as the language employed, indicates the same purpose. It will be observed that sections nine to fifteen of article eight, which contain the provisions as to the education and support of the blind, the deaf and dumb and juvenile delinquents, relate only to charitable, eleemosynary, correctional or reformatory institutions, while no mention is made of educational institutions which are not of a charitable character, and sections one to four of article nine relate to institutions within the state which are purely educational.

Besides, the various officers of the state, whose duties have led them to consider the relation of the New York Institution for the Blind to the state, have, with great uniformity, regarded it as one of the charitable institutions therein. It has been so treated by the several comptrollers of the state, the superintendents of public instruction, the boards of charities, and by the legislature as well, as will be seen by an examination of the reports of these officers and boards and the various acts of the legislature appropriating the money of the state for the purchase and maintenance of its property, and for the support of the indigent inmates therein.

It is doubtful if it can be fairly said that the principle here involved has not already been decided by this court. In *N. Y. Institution for the Blind v. How's Executors* (10 N. Y. 84), after reviewing the statute by which the relator was organized and the subsequent statutes relating to its manage-

ment and the support of its inmates, this court held that the relator was an institution for the support and education of the indigent blind, and was properly described as an institution for the instruction and maintenance of the indigent blind of the city of New York.

In *Riker v. Leo* (115 N. Y. 93, 102) that case was referred to by Judge GRAY, who said: "It was held that though the act of incorporation did not bring the objects of the institution within those described in the will, that 'subsequent legislation had so far modified the charter of the corporation in those particulars that when the will was made these several circumstances had been engrafted upon it and might well enter into a description of its general scope and purposes.'"

In *People ex rel. Inebriates' Home v. Comptroller* (*supra*), ANDREWS, Ch. J., quite thoroughly and exhaustively examined and discussed the history of the public charities of the state, and the origin and purpose of the provisions of the present Constitution relating to that subject. The opinion in that case shows quite plainly that the purpose of the framers of the present Constitution was to bring under the supervision of the board of charities all corporations or institutions of the state that were charitable or of a charitable character or design, which were wholly or partly under private control, and to prohibit the payment of any public money for the care or maintenance of any inmate of such an institution who was not received and maintained pursuant to rules established by that board. It also shows that the institutions for the care and education of the blind were regarded as charitable institutions within the meaning of the Constitution and statutes passed in pursuance of its provisions. The opinion in that case is an interesting one, has an instructive and important bearing upon the question under consideration, and seems to practically dispose of it.

Moreover, when we consider the decisions in other jurisdictions and the doctrine laid down by text writers, as to what is a charitable institution or a charitable use or trust, they seem to lead to the same conclusion. Thus, in *Asylum v. Phoenix*

Bank (4 Conn. 172), where a corporation had for its sole object the education and instruction of the deaf and dumb, which supported and instructed indigent persons of that class gratuitously, received a pecuniary compensation from pupils of ability to make it, derived its means of dispensing charity from the donations of individuals and of the public, and applied its funds exclusively to the general object of its institution, it was held that it was an institution of a charitable or eleemosynary character. *Russell v. Allen* (107 U. S. 163) is to the effect that a gift to be employed in founding an institution for the education of the youth of a county was a charitable gift.

In *Vidal v. Girard's Executors* (2 How. [U. S.] 127) it was said that donations for the establishment of colleges, schools and seminaries of learning, especially for orphans or poor children, were charities in a judicial sense. In *Chapin v. School District* (35 N. H. 445) it was held that a gift to promote education was a charity. *Gerke v. Purcell* (25 Ohio St. 229) is to the effect that a charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor, and that schools established by private donations, and which are carried on for the benefit of the public, not with a view of profit, are institutions of purely public charity. The opinion in that case by Judge WHITE is an instructive one upon this question, and he cites many authorities which have a direct bearing upon the question as to what is a charity or a charitable institution. A gift designed to promote the public good by the encouragement of science, learning and the useful arts, without any reference to the poor, is a charity. (*American Academy v. Harvard College*, 12 Gray [Mass.], 552.) To establish a professorship of the fine arts in a university, or to found an agricultural college, is a charity. (*Cresson's Appeal*, 30 Penn. St. 437; *Price v. Maxwell*, 28 Penn. St. 23; *Taylor v. Trustees, etc.*, 34 N. J. Eq. 101.) In *Jackson v. Phillips* (14 Allen, 539, 556) GRAY, J., referred to the definition of the word "charitable," as given by Mr.

Binney, who defined a charitable or pious gift to be, "Whatever is given for the love of God, or for love of your neighbor, in the catholic or universal sense — given from these motives and to these ends — free from the stain or taint of every consideration that is personal, private or selfish." That definition was approved by the Supreme Court of Pennsylvania in *Price v. Maxwell* (28 Penn. St. 35). The judge then referred to the rule of Lord CAMDEN, adopted by Chancellor KENT, by Lord LYNCHURST, and by the Supreme Court of the United States, which is: "A gift to a general public use, which extends to the poor as well as rich." (*Jones v. Williams*, Ambl. 652; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *Mitford v. Reynolds*, 1 Phil. Ch. 191, 192; *Perin v. Carey*, 24 How. [U. S.] 506.) He then gave his own definition of the word "charity," as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." In *Dartmouth College v. Woodward* (4 Wheaton, 526, 542) Chief Justice MARSHALL held that that college was an eleemosynary and private corporation.

In Angell & Ames on Corporations it is said: "Eleemosynary corporations are such as are instituted upon a principle of charity, their object being the perpetual distribution of the bounty of the founder of them to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent and sick, or deaf and dumb. And of this kind, also, are all colleges and academies which are founded where assistance is given to the members thereof, in order to enable them to prosecute their studies, or devotion, with ease and assiduity." (§ 39.) Morawetz, in his work on Corporations, says: "The distinguishing feature of charitable corporations is that they are formed for the administration of charitable trusts, and

not for the profit of the corporators themselves; for example, corporations formed for the management of free hospitals and asylums for the relief of the poor, insane, blind, or otherwise helpless." (§ 4.) Kent, in speaking of eleemosynary corporations, says: "In this class are ranked hospitals for the relief of poor, sick and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations." (p. 275.) In Burrill's Law Dictionary, in defining the word "charitable," it is said: "This word, in the expressions 'charitable uses,' 'charitable trusts,' is understood in a very large sense comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and for any other useful and public purpose, as well as donations for pious or religious objects." In Grant on Corporations, 115, it is said: "The legal definition of charity * * * is a gift to a general public use, which extends to the rich as well as poor, and property held for public purposes is held for charitable uses in the legal sense of the term charity." (*Attorney-General v. Heelis*, 2 Sim. & S. 76; *Attorney-General v. Mayor, etc., of Dublin*, 1 Bligh [N. S.], 312, 357.)

It is doubtless true that in many of the authorities cited the word charitable has been given a broader and more comprehensive meaning than should be applied to it, as it occurs in the Constitution and statutes relating to the subject under consideration. We think that, in determining the question before us, it should be given only its usual and ordinary meaning, and that, when so understood and applied, the relator must be regarded as a charitable institution so far as it clothes, educates and maintains indigent pupils at public expense or by donations from individuals. So far as it educates pupils who pay for their tuition, board and maintenance, it is not to be regarded as a charitable, but only as an educational institution. As to those pupils, the board of charities has no jurisdiction or power of supervision. Being to an extent charitable as well as educational, it clearly falls within the provisions of

the Constitution and statutes as an institution of a charitable character or design.

The legislature has not attempted by general laws or otherwise to control the rules established by the board of charities, and, hence, the last sentence of section fourteen of article eight of the Constitution has no application to this case.

The contention of the respondent, that the various appropriations for the support and education of indigent blind pupils in its institution have been made in pursuance of the constitutional obligation to provide for the education of all the children of the state, cannot, we think, be sustained. That provision is as follows: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (Art. 9, § 1.) Manifestly, this provision has no application whatever to the appropriations made by the state for the support and education of the indigent blind who have been inmates of the institution of the relator. In the first place, that provision is new, having gone into effect in 1895, and, as nearly all the appropriations made for the care and education of the blind by the relator were anterior to that time, they could not have been based upon it. Besides, that provision relates only to the public or common schools of the state, and has no application to an institution wholly or partly under private control.

It seems manifest that the appropriations prior to January 1, 1875, were made independently of the Constitution, because until that time there were no constitutional restrictions upon the power of the legislature to make appropriations of that character. After the amendment which went into effect in 1875, they were made under the special provision of the Constitution as amended, which permitted the legislature to make such provision for the education and support of the blind, the deaf and dumb and juvenile delinquents as to it might seem proper. Since the adoption of the Constitution of 1894 the appropriations have been made in pursuance of a similar provision contained in that

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

instrument. That the legislature had power to devote the money of the state to those purposes under the Constitution as amended in 1874 was clearly recognized in *Shepherd's Fold v. Mayor* (96 N. Y. 137, 145). In that case RAPALLO, J., said: "The general scheme of the constitutional provisions referred to seems to be that the general funds of the state shall not be given to local charitable institutions, except in aid of the blind, the deaf and dumb and juvenile delinquents." That such institutions were regarded as charitable is to be plainly implied from the language employed.

Again, the provision of the Constitution as to the education of all the children of the state in its common schools is a general one, while the provisions for the education and support of the blind, the deaf and dumb and juvenile delinquents are special, relating only to the classes enumerated. Therefore, it is obvious that, as to persons belonging to those classes, the special provisions must govern to the exclusion of the general one, and the former must be regarded as exceptions to the latter.

The claim that if the institution of the relator is charitable, then all the appropriations made to it by the state since the act of 1870 have been violative of the Constitution, seems wholly untenable. In *Shepherd's Fold v. Mayor* (*supra*) it was held that section ten of article eight of the Constitution did not prevent the application of state money to corporations or private institutions for the benefit of the blind, the deaf and dumb, and juvenile delinquents, as it made an exception from the general prohibition in favor of those objects. That seems to be the plain reading of the Constitution. Moreover, it was held in that case that, under section eleven of article eight, the counties, towns and municipalities of the State might devote money raised by local taxation to the support of the poor, and that the payment of money by a municipality to a private corporation for the support and education of orphans or friendless children, or for training and educating the children of poor clergymen, came within the exception permitting it to make provision for the support of its poor, and was not in conflict with that section. Within the principle of

that case, it seems clear that the state could appropriate its funds for the education and support of the blind, and that counties might appropriate the sum required for clothing the indigent pupils therein who were residents of the county making the appropriation.

If it be said that the third section of the act of 1870, requiring the counties of New York and Kings to appropriate money to enable this institution to furnish its indigent pupils with suitable clothing, is mandatory, and, hence, in conflict with and abrogated by section 14 of article 8 of the Constitution, as amended in 1894, the answer is, that chapter 754 of the Laws of 1895 is the law which controls, and, as it was intended to give effect to the amendments of the Constitution in that respect, and to cover the whole subject, it operated as a repeal of that section. If, however, this was not so, and the Constitution abrogated section three of the act of 1870, and section 230 of the charter of Greater New York is unconstitutional, I do not perceive how it would in any way change the character of the institution of the relator. It would simply furnish another reason why the decision in this case should be reversed, as, in that event, the supervisors would not be authorized to raise the amount specified.

Another argument presented by the respondent is that the charter of Greater New York authorizes the board of education to distribute a ratable proportion of the school fund to every pupil in the relator's institution, and, hence, it must be regarded as educational and not charitable. The defect in this argument lies chiefly in the assumption of the respondent that an institution cannot be educational and at the same time a charitable one. We have already seen that very many of the educational institutions of the land have been held to be charitable as well. When title four of chapter eighteen of the charter of Greater New York, which contains the provisions referred to, is examined, it shows conclusively that many, if not all, the charitable institutions of the city of New York, which are to any extent educational, are given a ratable proportion of the school fund. It gives a portion of that fund

to the schools maintained by the Five Points House of Industry; by the Ladies' Home Missionary Society of the M. E. C.; by the New York Orphan Asylum; by the Children's Aid Society; by the Roman Catholic Orphan Asylum; by the two half-orphan asylums; by the Society for the Reformation of Juvenile Delinquents; by the Leake and Watts Orphan House; by the almshouse for the city of New York; by the Association for the Benefit of Colored Orphans; by the Female Guardian Society; by the New York Juvenile Asylum; by the New York Infant Asylum; by the Nursery and Child's Hospital, and by the orphan asylums and industrial schools in the city of Brooklyn. To say that the appropriation of a portion of the school fund to the education of the inmates of these institutions changed their character from charitable institutions to institutions that are purely educational, seems quite absurd.

Any discussion of the question whether the statutes applying a portion of the common school fund to other than the common schools of the state are unconstitutional or otherwise, is wholly out of place at this time. If it be assumed that they are unconstitutional, provided those institutions are charitable in their character or design, it would only prove that the legislature had again overstepped the limits of the Constitution and passed certain statutes which were unauthorized. If such were the case, similar instances are not so rare as to render the enactment of such a statute sufficient evidence that these institutions were not of a charitable character or design, to overcome the facts which so clearly show such to have been their purpose. Besides, when we examine section 661 of the same act, we find that it expressly provides that no payments shall be made by the city of New York to any charitable institution wholly or partly under private control for the care, support, secular education or maintenance of any child surrendered to it, except upon a certificate that such child has been received and is retained by such institution pursuant to the rules and regulations established by the state board of charities.

It is true, as claimed, that the Constitution permits the legislature to make provision for the education of the blind, but to say that it, without qualification, permits the legislature to provide for separate education of the blind in an institution wholly or partly under private control, is incorrect. All the provisions of the Constitution relating to this subject should be read together. When so read, it becomes obvious that the power of the legislature to authorize counties to pay for the care, support or maintenance of the blind is limited by the constitutional provision which forbids such payments for any inmate of a charitable institution wholly or partly under private control, who is not received and retained pursuant to the rules established by the state board of charities. The question here is not whether the legislature may make provision for the education of the blind and appropriate money of the state for that purpose, but is, whether a county or city can pay its money to a charitable institution wholly or partly under private control for the care, support and maintenance of its inmates who are not received and retained therein pursuant to rules established by the state board of charities. Such payments are expressly forbidden by section 14 of article 8 of the Constitution as amended in 1894. The unqualified declaration of the Constitution is, that payments by counties or cities to charitable institutions wholly or partly under private control for care, support and maintenance may be authorized, but not required by the legislature; but that no such payments shall be made for any inmate of such institution who is not received and retained pursuant to the rules established by the state board of charities. This declaration of the organic law is plain and unambiguous, and expressly forbids the appropriation of money by the counties and cities of the state to any such purpose, unless the inmates are received and retained in the manner stated. Its manifest purpose is to make all appropriations of public moneys by the local political divisions or municipalities of the state to institutions under private control subject to the supervision and rules of the state board of charities.

N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

These considerations lead to the conclusion that the relator was, to an extent, a charitable institution, was, so far as it was charitable, subject to the visitation of the board of charities and the rules adopted by it, and that no payment could have been properly made to the relator for the maintenance or support of any indigent inmate not received and retained by it pursuant to the rules of that board.

Therefore, it follows that the orders of the Appellate Division and Special Term should be reversed, and the relator's motion for a peremptory writ of mandamus be denied, with costs to the appellant in all courts.

O'BRIEN, J. (dissenting). The defendant, as comptroller of the city of New York, has in his hands the moneys raised by taxation for the purpose of furnishing clothing to blind pupils from that city receiving instruction in the New York Institution for the Blind, under § 3 of chapter 166 of the Laws of 1870. The institution has presented to the comptroller the proper bills and vouchers upon which to draw the money, but he has refused to audit or pay them for the sole reason that the state board of charities has notified him that the institution has not complied with certain rules and regulations formulated by that body with respect to charitable, correctional and reformatory institutions. There is nothing in the record or in the printed rules of the board to show what particular rule is claimed to apply to this institution or has been disregarded.

The managers of the institution assert that it is an educational and not a charitable corporation; that it is engaged in the business of educating blind children and is in no just sense a charitable institution. Moreover, they contend that it would be derogatory to its reputation, standing and success as an educational institution, engaged in the training and instruction of a special class of pupils, who are collected from all parts of the country and from other counties, to group it with poor houses, asylums and reformatories, rather than strictly educational institutions where it properly belongs.

That such a classification would convey a false impression of the character and objects of the institution and thus embarrass and hinder its work, is, of course, quite possible.

These objections to the position of the comptroller and the state board of charities are fully set forth by the managers in the papers that appear in the record and upon which the court, at Special Term, granted a peremptory writ of mandamus requiring the comptroller to audit and pay the bills. The Appellate Division has affirmed the order and the comptroller appeals to this court.

The controversy, in one aspect, turns upon the single question whether the relator, the New York Institution for the Blind, is a charitable or an educational institution. If it is to be classed with the former, and is fairly within the meaning of the provision of the Constitution hereafter referred to, then the state board of charities is entitled to participate with the managers in its government, and has jurisdiction over it for the purpose of prescribing rules and regulations and exercising visitorial powers, but if it is to be classed with the latter it has not. The officers of the institution have stated in the moving papers as matters of fact, as already noted, that to classify the institution as one dispensing charity in some form, or as one the inmates of which are beneficiaries of charity in some form, would impair its reputation and usefulness as an institution of learning which it is claimed is its true character. The specific grounds or reasons upon which the managers base this contention have not been stated in such a manner that we can fully appreciate their force, but it is quite obvious that we should not resort to any strained or refined construction of the Constitution or the statutes in order to bring the institution within that class of corporations known and designated as charitable or reformatory. The true character of the corporation must be ascertained from the objects and purposes for which it was created, and the nature of the business in which it is now engaged.

The class to which any corporation properly belongs must be determined primarily from its powers and duties as enu-

merated in the charter. The object of its existence and the general functions which it may legally exercise and discharge are always supposed to be found in the statute from which its corporate life is derived.

The relator was incorporated under chapter 214 of the Laws of 1831 for the purposes clearly stated in the statute, in these words: "All such persons as now are or hereafter may become members of the said institution shall be, and are hereby constituted and appointed a body corporate and politic, in fact and in name, by the name and style of The New York Institution for the Blind, for the purpose of instructing children who have been born blind, or who may have become blind by disease or accident, and by that name they and their successors shall and may have succession and shall be in law capable of suing and being sued, pleading and being impleaded, defending and being defended in all courts and places whatsoever, in all manner of actions, suits, matters, complaints and causes whatsoever."

The purpose for which the corporation was created was, therefore, the instruction and education of children who have been born blind, or who may have become blind by disease or accident. It was not created for the purpose of administering any charity, or of dispensing alms for the relief of poor persons. It was a purely private corporation, organized for a purely educational work, namely, the instruction of a particular class of children. It has nothing whatever to do with the maintenance or care of that class known as the indigent blind, composed of persons of all ages and conditions. They are, no doubt, objects and beneficiaries of charity, and as such maintained and cared for by the state as a public charge in whole or in part. So far as this class are concerned, public moneys are raised and paid for care and maintenance and not for education. The indigent blind are beneficiaries of public charity in the same sense as the inmates of almshouses and poorhouses, though they may be maintained in separate and special institutions.

Those institutions are primarily charitable in their nature.

The inmates, as a general rule, have passed the educational period of life, and whatever of instruction or mental discipline they may receive is merely incidental to the main object, which is personal relief.

Money contributed by the state, or any of its political divisions, for the purpose of educating blind children, is in no sense charity, while that contributed for the support of the *indigent* blind is, or may be.

The duties and obligations of the state with respect to education should not be confused with those that concern the care and support of the poor and unfortunate. The two obligations rest upon distinct theories, and have been assumed upon principles and for reasons that differ widely from each other. The state, through the Constitution, has taken upon itself the duty of imparting to every child within its jurisdiction, whether rich or poor, an education sufficient to enable him to discharge the duties of good citizenship and to earn his living in some lawful calling. The legislature is commanded to provide for a system of free schools in which all children may be educated. (Art. 9, § 1.) That the state owes as much to the unfortunate child who has been born or become blind, as it does to the child that can see, is a proposition which, it may be assumed, no one will deny. The blind child becomes a citizen and must engage in the struggle for existence as well as the more fortunate one who can see. The state is bound to educate them both, but it is obviously impossible to discharge this duty in the same way or under the same system. The conditions that surround the two children differ so widely that, while one may be educated in the common schools, the other must be educated in a different school, with different modes of instruction and different rules of discipline. It was to meet this obvious want in the case of blind children that the relator was incorporated. The state has not assumed this duty of education from any motives of charity or benevolence. The obligation rests upon a very different and much more selfish principle. It is really the principle of self-protection. Since a free state, founded upon the popular will,

cannot exist unless sustained by intelligent and educated citizenship, the state itself assumes all the duties and obligations incident to such training and education. Hence, every child may claim from the state as a right such an education as will enable him to become a good citizen, and that term obviously implies reasonable fitness for all the duties of life. The state may, in some cases, furnish books for the child, and even clothing, but in doing so it dispenses no charity, but simply discharges an obligation which it has assumed. For every dollar that the state expends in the education of children, unable to educate themselves, it is supposed to receive an equivalent in a more elevated standard of citizenship.

But no one can claim charity as a right. Contributions for the support of the poor and unfortunate, whether they proceed from public or private sources, are purely voluntary and founded solely upon motives of religion and humanity. The demands of charity, whether upon individuals or the state, are always addressed to that conscientious sense of duty to relieve human suffering and to administer aid to those who are in distress.

While civilized governments in modern times do not disregard its claims, yet they are founded upon a duty of imperfect legal obligation. But the obligation to educate the children who are to become the future citizens is found in the express mandate of the Constitution, and enforced by compulsory laws.

Institutions that receive public or private funds for the support of the poor are properly classed as charitable institutions, since they dispense or administer charity in some form to those who are dependent upon it, and the inmates of such institutions are the beneficiaries and recipients of charity. But blind children who are educated wholly or partially by the aid of public moneys, are not the beneficiaries of any charity any more than the other children of the state who are educated at the public expense; and institutions for the education or instruction of blind children are not properly classed as charitable institutions any more than academies or schools

receiving state aid. Since all the children of the state may claim the benefit of an education as a right secured to them by the Constitution, the blind child who happens to receive instruction in a private institution to which the state has contributed money to a limited extent, because it cannot, in that case, fully perform the duty of education itself, cannot properly be classified as a pauper. He stands upon the same footing as every other child in the state, and is simply a beneficiary of its policy of free education. The general government, through the action of Congress, has made provision for the support and military education of young men selected from congressional districts according to law, but it has never been supposed that the institutions in which they are educated are of a charitable nature, or that the young men themselves were the objects or beneficiaries of any charity.

Keeping always clearly in view the broad distinction between education and charity, we may now examine the statute under which the money in question was raised, in order to ascertain the object and purpose to which it was to be devoted. It was clearly intended for one or the other of these objects, that is, charity or education, but it is important to determine which. The material parts of the act of 1870, and under which this controversy has arisen, are as follows :

"Section 1. The managers of the New York Institution for the Blind are hereby authorized to receive, upon the appointment of the Superintendent of Public Instruction, made for a term not exceeding five years, all blind persons, residents of the counties of New York and Kings, between eight and twenty-five years of age, who, in the judgment of the board of managers of said institution, shall be of suitable character and capacity for instruction, and shall have charge of their maintenance, education and support, and shall receive compensation therefor from the state in the same manner as is now provided by law. The term of such appointments may be extended from time to time, by the Superintendent of Public Instruction, on the recommendation of the board of managers of the said New York Institution for the Blind, for such

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further period as they may deem advantageous in each individual case.

"Section 2. Application for admission into the institution shall be made to the board of managers, and each application shall set forth the age, the fact of blindness, and that the applicant is a legal resident of the town, county and state claimed as his or her residence, with such other information as the board may require; and each application shall be sworn to by the applicant, or his or her parents or guardian, and shall be signed by at least one member of the board of supervisors of the county in which the applicant may reside, and also be recommended by the president and superintendent of the said institution, and transmitted by the said institution to the Superintendent of Public Instruction.

"Section 3. The supervisors of the county of New York or Kings, from which State pupils shall be sent to and received in the said institution, whose parents or guardians shall, in the opinion of the Superintendent of Public Instruction, be unable to furnish them with suitable clothing, are hereby authorized and directed in every year while such pupils are in said institution, to raise and appropriate fifty dollars for each of said pupils from said counties respectively, and to pay the sum so raised to the said institution, to be by it applied to furnishing such pupils with suitable clothing while in said institution."

It will be seen that the institution is not obliged to receive any of the persons mentioned in the statute. It is a private institution, and may receive them or not at discretion. It has no power or right to receive them for any purpose but that of instruction or education. It can admit only such as are within certain age limits, embracing the educational period of life, and then only for a limited time. It cannot receive them otherwise than upon the appointment of the Superintendent of Public Instruction, who is the head of the educational department of the state. The children must, in the judgment of the managers, be of suitable character and capacity for instruction. The Superintendent cannot properly appoint the per-

sons described, and the managers cannot properly receive them into the institution, except for the purpose of education. They may or may not be poor children, since the statute is silent on that point. The Superintendent may make the appointment according to his own judgment, but whether they are rich or poor the manifest purpose of placing them in the institution is education. They cannot enter for the purpose of support or as beneficiaries of charity. It is true that when received the state pays for their education and support, but support and maintenance are, in that case, merely incidental to education. The children cannot be educated without being kept in the institution, and so education and support must go together, and the state pays for all. But this is not charity. It is the discharge of the obligation which the state has assumed, to furnish to all children an education to fit them for the duties of citizenship. None of the children thus instructed are the beneficiaries or recipients of charity, any more than the children educated in the free common schools. In both cases the state is discharging the obligation, but in different ways and by different methods, since the circumstances and conditions of the children are different, but the theory and principle upon which it acts are in both cases the same. The sole purpose of collecting these blind children in this institution and retaining them there was, not relief from poverty or want, but to impart to them some useful knowledge, which is the end and aim of all education.

Since the enactment of the statute of 1870 the state has paid to this institution nearly a million and a quarter dollars out of the public treasury for the education of blind children. This vast sum was not a contribution by the state to charity, any more than the many millions which were paid during the same time for the support of free common schools.

In each case the money was really raised and paid for the same general purpose and in pursuance of the same general policy. The difference was in the methods employed to accomplish the same result, which was education. The private institutions which received and educated these blind

children under contract with the state were not for that reason charitable institutions any more than the schools and academies in which the other children of the state were educated. They cannot be properly classified otherwise than as educational institutions. The state makes use of them as instrumentalities for discharging the obligation enjoined by the Constitution to provide for the education of all the children of the state. Most clearly the relator is not a charitable institution unless it is engaged in administering some charity of which the inmates, or some of them, are the beneficiaries. What charity does it dispense and what alms do the inmates receive? Whoever asserts that the institution is of a charitable nature should be able to answer these questions clearly and satisfactorily. The institution receives no money from the public for which it does not render a full equivalent, and, therefore, it receives nothing for charity. It is beyond dispute that the work in which it is engaged is the education of blind children of a certain age, under contracts with their parents or guardians, which include not only instruction, properly so called, but support for the time during which the educational process is in operation. From the nature of the case, it is impossible to educate these children in one place and support them in another. The main object, which is education, includes the incident of support for the time being, since the two things are inseparable. The institution does nothing for charity. It educates blind children for a fixed compensation under an agreement, express or implied, purely as a matter of business. The state is one of its patrons for the reason that, having assumed the obligation to educate the blind as well as all other children within its borders, it can discharge that obligation as well or better by employing the relator than by building and maintaining like institutions of its own. Hence, it sends, through its constituted authorities, children to this institution under contracts, and when they are received they are on precisely the same footing as the children placed there by parents or guardians. It pays for their instruction and, incidentally, for their support while in the institu-

tion, not from any motives or upon any principles of charity, but in order to promote its own interests by preparing the children to assume the duties of citizenship, to engage in the affairs of life and, so far as possible, to help themselves in the world, instead of becoming a charge upon the public. It was only upon this theory that the legislature could lawfully have authorized the payment of the large sum already mentioned to this institution, since, as we shall presently see, if the relator is a charitable institution and the money was given and received for a charitable purpose, the legislature, in appropriating it, and the state comptroller, in disbursing it, violated the plain restrictions of the Constitution; and yet no question is raised here as to the legality and propriety of these payments by the state.

The contention of the defendant is limited to the money raised by the county, under the third section of the act, for the purpose of furnishing clothing to certain of the pupils admitted upon the appointment of the Superintendent of Public Instruction, when, in his opinion, the parents or guardians of any of the children so admitted shall be unable to furnish it. The argument is, that since this money, raised by local taxation, is to be paid to the institution for the purpose of defraying the expense of clothing such children as may be unable to procure the proper clothing otherwise, it is a gift for charitable purposes, and the institution receiving it becomes a charitable institution.

This contention is, I think, quite inadmissible. The discipline of the institution requiring a uniform dress is incidental to the process of education, and, from the nature of the case and the circumstances in which the children are placed, a part of the obligation which the state has assumed and may devolve upon the locality. But money paid for clothing under such conditions is not charity any more than money paid for books or other means of instruction would be. Should the state or a county assume the obligation to furnish books or even clothing for certain poor children in order to enable them to attend the common schools, it would not be a gift to

charity, and the schools would not thereby be converted into charitable institutions, nor could the children benefited by the contribution be properly classed as paupers. They would, indeed, be properly classed as beneficiaries of the system of free education enjoined by the Constitution ; but that is quite a different thing. The obligation to maintain a system of free education for all may properly carry with it many incidental things involved in or connected with the main object.

The consideration of the provision of the present Constitution on this and kindred questions is now in order, as it is upon these provisions that the contention of the defendant mainly rests. They are to be found in certain sections of article eight, and so far as they have any relation to the questions in this case read as follows :

"Section 9. Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes."

"Section 10. No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation ; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law. * * *

"Section 11. The Legislature shall provide for a State Board of Charities, which shall visit and inspect all institutions, whether State, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional or

reformatory character, excepting only such institutions as are hereby made subject to the visitation and inspection of either of the commissions hereinafter mentioned, but including all reformatories except those in which adult males convicted of felony shall be confined; a State Commission in Lunacy, which shall visit and inspect all institutions, either public or private, used for the care and treatment of the insane (not including institutions for epileptics or idiots); a State Commission of Prisons who shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors."

"Section 13. Existing laws relating to institutions referred to in the foregoing sections and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the Constitution, shall remain in force until amended or repealed by the Legislature. The visitation and inspection herein provided for, shall not be exclusive of other visitation and inspection now authorized by law."

"Section 14. Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State Board of Charities. Such rules shall be subject to the control of the Legislature by general laws." (Art. 8.)

"Section 1. The Legislature shall provide for the maintenance and support of a system of free common schools,

wherein all the children of this State may be educated." (Art. 9.)

"Section 4. Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." (Art. 9.)

It will be seen upon a careful reading of these sections that two vital points involved in this case, and which, in my opinion, control the decision, are made perfectly clear.

1. The prohibition against payments of public money by cities or other political divisions of the state to institutions where the inmates have not been received and retained therein, pursuant to rules established by the State Board of Charities, applies only to charitable, correctional or reformatory institutions, wholly or partly under private control, for care, support or maintenance. The institutions subject to visitation and regulation by that board must belong to the class specified, and the inmates must have been received and retained therein for the purpose specified, that is, for *care, support and maintenance*. The relator is an educational institution and the inmates are received and retained therein for the purpose of education and instruction and not as poor persons or *for care, support or maintenance*. We have already seen that they could not lawfully have been placed in this institution for any such purpose. If their parents or guardians were unable to support or maintain them they should have been placed in some institution for the indigent blind. The state, in selecting children for instruction in this institution, cannot take into consideration the poverty or wealth of the child.

The relator is not an asylum for the relief of poverty or want in any form or in any degree, but a school for the education of the blind, and the state, when extending the benefits of such an institution to a limited number of the children that it assumes to educate, has no right to place upon them, or

any of them, a badge of pauperism any more than the general government has the right to send the West Point graduates out into the world as poor scholars or the beneficiaries of charity.

2. The restrictions contained in the Constitution upon the payment of public moneys to private institutions, except that contained in § 4 of article 9, have no application to appropriations or moneys for the education of the blind. The broad and sweeping prohibition of the section last referred to against payments to certain religious institutions doubtless apply to all public moneys or property and to every form of public aid, but obviously it has no application to this case since the relator is not an institution that comes within the words of the section.

It is suggested that it was the intent and purpose of the constitutional provisions above cited to subject all institutions receiving public aid in any form, whatever their character may be, to visitation and regulation by the State Board of Charities, but this proposition is clearly indefensible. Schools, academies, colleges and other educational institutions receive public money from the state or localities, but no fair construction of the Constitution can bring them within the scope of the powers vested in the department of charities. Nor is it at all necessary in furtherance of any sound public policy to resort to any strained construction to accomplish such a result. They are all subject to visitation by the head of the educational department and thus every public interest is amply protected. (Laws of 1894, ch. 536, art. 14, § 40.)

There is another view of the case that is entitled to great weight in the inquiry whether the relator is a charitable institution or one for educational purposes. It cannot be held that it is of a charitable nature without condemning as unconstitutional and void the acts of the legislature passed in every year since the enactment of the statute of 1870, the action of the State Comptroller in paying the money so appropriated to this institution and all existing laws providing for or requiring such payments. This result must inevitably follow the conclusion that the relator is a private charitable institution, if that view should prevail.

1. It was held in the case of *Shepherds' Fold v. Mayor* (96 N. Y. 137) that the state could not appropriate and pay from its treasury public money for the support of the poor in a private charitable institution for the reason that the Constitution forbids it, but that such prohibition did not apply to moneys raised by local taxation. In so far as the state is concerned the Constitution is the same now as it was then. But we have seen that the state *has* appropriated, and that the State Comptroller has paid in every year since the act of 1870 was passed, moneys to this institution as compensation for the support of the children placed there by the Superintendent of Public Instruction, which amounts in the aggregate to the sum above stated. Now, if the relator is a charitable institution and the money was paid for the support of the poor, or as charity to relieve distress, the Constitution was clearly violated and the money paid without authority of law. It is only upon the theory that the money was paid to a private educational institution as compensation for the education of blind children that the payment by the state of such a large sum of money to the relator can be justified or defended. In my opinion it was properly appropriated and paid upon that principle, since the payment of money for the education of the blind is expressly excepted from the restrictions of the Constitution.

2. The third section of the act of 1870, which requires the city of New York to raise the money in controversy to defray the expense of clothing certain children placed in this institution, is clearly mandatory, and as mandatory laws for such payments by cities or counties to charitable institutions are now forbidden by the Constitution, the statute is abrogated entirely. (*People ex rel. Inebriates' Home v. Comptroller, etc.*, 152 N. Y. 399.) But if it should be considered as a statute requiring the city to raise money for the education of blind children, as I think it should be, the Constitution does not invalidate it.

3. The act of 1870, in so far as it requires the city of New York to raise and pay money for clothing pupils in this institution, has virtually been superseded by the recent statute,

known as the charter for Greater New York, which requires the city in each year to raise and pay to the relator \$50 for each state pupil in the institution from that city whose parents, in the opinion of the Superintendent of Public Instruction, shall be unable to furnish them with suitable clothing, to be by it applied to furnishing such pupils with suitable clothing while in said institution. This is also plainly a mandatory enactment, and is clearly a violation of the Constitution if the relator is to be classed as a private charitable corporation. But if the money thus provided for should be regarded as a contribution for the education of the blind within the limits of the new city, as it clearly should be, the validity of such a provision is beyond question. But it is only upon this theory, which is wholly inconsistent with the defendant's contention, that the statute can be maintained. (Laws 1897, ch. 378, § 230, par. 22, sub. 6.)

4. The charter also contains another provision which in its relation to the question under consideration is worthy of notice. By § 1161 the board of education is required to distribute to the managers of this very corporation a ratable proportion of the school fund to every blind pupil in the institution without regard to age. Assuming, for the purpose of the argument, that it is a charitable institution, as claimed by the defendant, this enactment is clearly in violation of the Constitution for two reasons: (1) It is mandatory, requiring a local board to distribute funds in its hands or under its control for local school purposes to a private charitable institution for charitable purposes. (2) It diverts the school fund to charitable uses in disregard of the express inhibition of the fundamental law. (Con. art. 9, § 3; *People v. Board Ed. of Brooklyn*, 13 Barb. 400; *Gordon v. Cornes*, 47 N. Y. 608; *People ex rel. S. A. Observatory v. Allen*, 42 N. Y. 404.)

It is only upon the theory that the institution is a school for the education of the blind that a statute, virtually providing that the pupils shall share in the public moneys for school purposes in the same way and in the same proportion as the children educated in the common schools, can be upheld.

It ought not to require argument to prove that money raised by taxation for school purposes, or derived from the income of the school fund, cannot be devoted to charity or paid for the benefit of a charitable institution. Such a diversion of a fund would be a manifest fraud upon the taxpayers, even if there were no constitutional restrictions in the way, and yet that is precisely what the legislature has done by this section of the charter if the relator be a charitable institution, and the money is to be paid to it for a charitable purpose.

But if the legislature has authorized it to be paid to an educational institution and for the purpose of educating blind children, as I think it has, then it was devoted to the very purpose for which it was intended when raised. This provision of the charter cannot be sustained upon any other principle under the restrictions of the Constitution.

It is quite apparent from what has been stated that the legislature, the recent commission of eminent citizens charged with the important duty of preparing a charter for the new city, as well as the chief financial officer of the state, have all acted upon the theory, in dealing with this institution, that it was an educational and not a charitable corporation. This theory underlies all the legislation referred to, and in administration has been assumed or adopted by every agency of the state.

The learned counsel for the defendant have evidently overlooked an important feature of this case, which has been incidentally referred to in the preceding discussion, but which should perhaps be stated with more distinctness.

The legislature, in providing money for the education of the blind, is a law to itself. It is left perfectly free to act as it may think proper, and is not bound by any of the constitutional restrictions or limitations referred to. The language of the Constitution is so clear on this point that it is impossible to misconceive the meaning.

"Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind * * * as it may deem proper."

Thus the legislature is given free scope in making provision for the education of the blind. It may grant money for that purpose to public or private institutions, to be raised by general or local taxation. It may direct the payment of such money to such institutions without any conditions whatever, except such as it may itself see fit to impose. The constitutional condition that payments shall not be made unless the inmates are received and retained under the rules of the State Board of Charities, is in that case silent. Neither that nor any of the other restrictions have any application to grants of money for the education of the blind. All appropriations for that particular purpose are subject only to the judgment and discretion of the legislature. In the case at bar the legislature has enacted that certain moneys raised by local taxation shall be paid to the relator. It has granted the money and made it payable without any conditions whatever. But the defendant, as the administrative officer who has charge of the fund, refuses to pay it over unless certain conditions have been complied with by the relator. These conditions, by the very words of the Constitution, have no application to moneys raised for this particular purpose, and the legislature itself has not attached any such conditions to the grant.

Thus the defendant of his own will requires the relator, before it can receive the money granted to it by the legislature, to comply with certain conditions or rules that, so far as the relator is concerned, have no foundation in the Constitution or any statute.

The legislature has provided, as we have seen, by general laws that institutions for the education of the blind shall be subject to visitation by the Superintendent of Public Instruction, but that is not made a condition of the payment of the money in question. It has also provided that charitable institutions shall be subject to visitation by the State Board of Charities (Laws 1896, ch. 546, art. 1, §§ 2, 10), but that is not made a condition upon which the relator is to receive the money in question. One of these statutes (Laws of 1895, ch. 771, § 11) provides that institutions for the blind shall be sub-

jected to such visitation by the State Board of Charities *as the Constitution provides*. It provides for inspection of *charitable* institutions, and those include only such institutions as are devoted to the care and support of the *indigent* blind as part of the poor, not blind children who are being educated at the public expense in whole or in part. The relator has charge of a large number of blind children who have been placed there, and are paid for by parents or guardians. That class constitute the vast majority of the pupils. If there were no others, surely no one would then claim that it was a charitable institution. It would be absurd to assert that, when every pupil paid his own way, there was any element of charity connected with the relator's operations. Manifestly it would then be a private school for the blind, and nothing else. But how can it be said that when the state becomes a patron of such a school, and sends children there, that it has assumed an obligation to educate and makes contracts for their education and support while in the institution, just as parents and guardians make contracts, that the character of the institution is changed from a private school to an institution of charity. It is more reasonable to say that the state may educate a few of its unfortunate blind children in a private school for that purpose, without classifying them with the objects and beneficiaries of charity. But, apart from all this, can there be any doubt that it is perfectly competent for the legislature to pass a mandatory act providing for the support and education of the blind by taxation upon a city, town or county, and directing the money to be paid to a private institution, such as the relator is, irrespective of any rules of the State Board of Charities? The Constitution answers the question by expressly enacting that nothing therein contained shall prevent the legislature from doing that very thing, and if it may do that, then the relator is entitled to receive the money in question without compliance with any conditions whatever, since the restriction upon payments by localities, without compliance with the rules of the board of charities, has no application to such a case. The plain meaning of the Constitution is that

the legislature may place blind children in such institutions as it may think proper, whether public or private, charitable or non-charitable, and provide for their education and support with public money raised either by general or local taxation, and it may direct that money to be paid to the institutions in which such children have been placed, without compliance with the rules of the board of charities, or any other condition whatever. Nothing in the Constitution can prevent the legislature from executing its own policy, whatever it may be, when making provision for educating the blind. The relator is most clearly a private corporation or institution of some kind. It has no public or political functions of any kind to perform. It has no relations with the state save those which every other private corporation has. The income which it receives, and the funds which it has or owns, are derived solely from the prosecution of its corporate business, which is the education of blind children. It does not depend upon or derive anything, so far as appears, from charitable gifts or donations, public or private. It is not engaged in dispensing the gratuities of the benevolent or charitable grants from the state, but is conducting its operations with its own means. It receives pupils from parents and guardians, and from the state, and educates them for pay. It receives nothing from charity, and gives nothing to charity.

Whatever moneys it receives from the state or from localities it receives for the same purpose and in the same way as that from parents and guardians, and it renders to the state the same services and returns the same equivalent.

It is not bound by any law to receive pupils from the state or to retain those which it has received, but may discharge the state pupils at any time, and then, certainly, it would be nothing but a purely private school, supported by the private contributions of the parents and guardians, and, certainly, it would then be impossible for any reasonable man to consider or classify it as a charitable institution. But the true character of the institution, whether charitable or educational, is not to be determined by the presence or absence of a few state pupils,

but by the general objects of its incorporation and the nature of the business in which it is engaged.

It cannot be a charitable institution to-day and an educational institution to-morrow, depending always upon the circumstance whether the state is or is not one of the patrons of the school. It is always either the one or the other, and if it is not charitable when no state pupils are retained, it is not made such by the mere fact that the state makes use of it for the purpose of discharging its obligations to provide for the education of all the children within its limits.

There is nothing to show that any of the state pupils could not have been supported and maintained by the parents and guardians at home, but that would not comply with the policy of the state to see to it that even blind children should receive the benefit of an education so far as possible.

The restrictions with respect to payments by localities to charitable, correctional and reformatory institutions, without compliance with the rules of the State Board of Charities, had no reference whatever to such institutions as the relator. This, I think, is clear, not only from what has been said, but from the very language of the Constitution itself and the relation which the restrictive words bear to the rest of the section in which they appear. The first sentence of the section takes every provision for the education of the blind out of every restriction in the Constitution, and leaves the legislature at liberty to deal with that subject at discretion. The rest of the section deals with other classes of persons and other institutions, namely, orphan asylums, homes for dependent children or correctional institutions, whether under public or private control, and localities are permitted to make provision for the care, support, maintenance and secular education of their inmates. Having taken these specified institutions out of the general restriction in section ten of the article against loans or gifts of money by cities, towns or villages to individuals, associations or corporations, the remainder of the section simply regulates the manner in which such gifts or grants to such institutions shall be made. It provides, first, that the legisla-

ture may authorize but shall not require them ; and, secondly, that the money shall not be paid to the institution unless the inmates are received and retained therein pursuant to the rules of the department of charities. The framers of the Constitution, in prescribing the regulations, applied them specifically to "charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control," and again to "such institutions," but it is manifest that these terms are simply descriptive of the institutions specifically named in the preceding part of the section, that is, orphan asylums, homes for dependent children and correctional institutions, and were not intended to include schools for the education of the blind. This section of the Constitution simply provides that the legislature may authorize, but not require, localities to provide for the support and secular education of the inmates of orphan asylums, homes for dependent children or correctional institutions, but that payments shall not be made to them unless the inmates are received and retained under the rules of the board of charities.

The restriction applies only to those institutions specifically named in the section, for the benefit of which localities were permitted to raise money. It could not possibly apply to the relator, since, by the express words of the first part of the section, the legislature was completely emancipated from all restraints when providing for the support and education of the blind. We are concerned in this case with but one question, and that is, whether a financial officer like the defendant may withhold money in his hands from the relator when it has been appropriated by the legislature unconditionally, until it complies with the regulations of the state board of charities. In other words, whether the restriction upon payments by localities to charitable institutions has any application to the relator. It seems very clear to me that it has not. It was manifestly intended for another class of institutions since all restrictions upon legislative provisions for the education of the blind were removed and the whole subject left with the legislature. It seems to me impossible, therefore, by any fair pro-

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Statement of case.

cess of reasoning or argument to classify this institution among those designated in the Constitution as charitable, correctional or reformatory, or to include the pupils placed and retained therein among the beneficiaries of charity, or to apply the restrictions of the Constitution to such a case.

This discussion has assumed a scope and extent that might seem, at first view, to be wholly unnecessary. The only purpose has been to elucidate a question of some public importance, closely related to legislation and administration, and with respect to which there is not only a wide divergence in the views of counsel, but, apparently, some conflict of opinion among ourselves. If the discussion has contributed anything tending to reconcile opposing views, or to point out the correct solution of the question, it is to be hoped that the fault of prolixity may be overlooked.

The order should be affirmed, with costs.

MARTIN, J., reads for reversal. All concur, except O'BRIEN, J., who reads for affirmance, and GRAY, J., absent.

Orders reversed.

HENRY W. SAGE, Appellant, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

1. NEW YORK CITY — COLONIAL RIPARIAN GRANT. The grant made by Governor Nichols in 1667, conveying to the inhabitants and freeholders of the village of New Harlaem, on Manhattan island, certain lands bounded therein by the Harlem river, conveyed only to high-water mark; and, hence, the grantees took title to the uplands only, and became simply riparian proprietors upon navigable tidewater.

2. PUBLIC IMPROVEMENTS — RIPARIAN OWNERS. As against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater.

3. IMPROVEMENT OF WATER FRONT. The city of New York has absolute power to improve the water front of Manhattan island for the benefit of navigation, free from any interference by the riparian owner, whose sole right against the state or its municipal grantee, as the trustee for the public, is the pre-emptive right to purchase, in case of sale, when conferred by statute.

154	61
f 157	447
154	61
160	267
154	61
f 168	* 189
168	* 140
168	* 141
168	* 148
168	* 144
168	* 147
154	61
169	* 69

4. GRANT OF RIPARIAN LANDS — IMPLIED RESERVATION. In every grant of lands bounded by navigable tidewaters, made by the crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner.

5. COLONIAL CHARTERS. The Dongan and Montgomerie charters, ratified and confirmed by the State Constitution of 1777, vested in the city of New York the absolute title to all the surrounding land between high and low-water mark.

6. TITLE TO MADE LAND. Land made by the city of New York in rightfully filling up the water front and constructing piers, under its ancient charters and subsequent constitutional legislation, does not become the property of the riparian owner through the doctrine of accretion, but remains the property of the city for the benefit of the public.

7. SUBORDINATION OF RIPARIAN RIGHTS. The riparian rights of an owner of Harlem upland are subordinate to the right of the city of New York, under its ancient charters supplemented by constitutional legislation and state grants, to fill in and make improvements, such as an exterior street, docks and bulkheads, from the high-water mark in front of his upland to and below low-water mark, essential to navigation and commerce, without compensation.

Sage v. Mayor, 10 App. Div. 294, affirmed.

(Argued June 9, 1897; decided October 12, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1896, affirming a judgment in favor of defendant entered upon a decision of the court at Special Term dismissing the complaint.

The plaintiff, as the owner of a parcel of land lying between 94th and 95th streets on the Harlem river, which is a navigable stream where the tide regularly ebbs and flows, traces his title back to a grant made by Governor Nichols on the 11th of October, 1667, whereby he conveyed to the inhabitants and freeholders of the village of New Harlaem certain lands bounded on one side by the "Harlem River or any part of the said river on which this island," (of Manhattan), "doth abut * * * together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting and fowling and all other profits, commodities, emoluments and other hereditaments belonging to the

said lands and premises within the said bounds and limits set forth, belonging or in anywise appertaining." Said grant was confirmed by Governor Dongan on the 7th of March, 1686, and under this title by an unbroken series of conveyances the plaintiff, on the first of October, 1861, became seized and possessed of all the premises in question, so far as they consist of uplands or lands which, in a state of nature, were above water. By virtue of this title he also claims all the rights and easements which ordinarily belong to a riparian owner of lands bounded by a navigable river, in which the tide ebbs and flows. He further claims to have acquired, from the same source, title to the tideway, and for some distance into the stream beyond.

The city of New York claims title to the land formerly under water, which used to lie between high and low-water mark in front of the uplands belonging to the plaintiff, by virtue of a grant made by Governor Dongan on the 26th of April, 1686, whereby he conveyed to the mayor, aldermen and commonalty of the city of New York, "All the waste, vacant, unpatented and unappropriated lands lying and being within the said city of New York and on Manhattan island aforesaid, extending and reaching to the low-water mark in, by and through all parts of the said city of New York and Manhattan island aforesaid, together with all rivers, rivulets, coves, creeks, ponds, water and watercourses in the said city and island, or either of them," except such portion as had been previously conveyed. Said grant provided that the grantees might, "at any time or times hereafter, when it to them shall seem fit and convenient, take in, fill and make up and lay out all and singular the lands and grounds in and about the said city and Island Mannhattans, and the same to build upon, or make use of, in any other manner or way as to them shall seem fit as far into the rivers thereof, or that encompass the same as low-water mark aforesaid." This grant was confirmed by Governor Montgomerie on the 15th of January, 1730, as well as by an act of the colonial legislature passed on the 14th of October, 1732 (L. 1732, ch. 584), which, in turn, was con-

firmed by the first Constitution of the state. (§ 35.) By chapter 50 of the Laws of 1775, the division of the township of Harlem from the city of New York specifically left the tideway in the latter.

The city of New York further claims title to the lands under water in front of, and outside of, the tideway and extending into the river for a considerable distance, by virtue of certain grants from the state. By chapter 285 of the Laws of 1852, the city was authorized to lay out an exterior street along the Harlem river, and the title of the People was thereby conveyed to the city "in and to lands under water from low-water mark to and including the said exterior street," subject to a pre-emptive right to purchase by the adjacent owner in case of a sale by the city.

Pursuant to chapter 763 of the Laws of 1857, a bulkhead line or line of solid filling and pier line was established in the Harlem river, outside the line of low-water mark, and subsequently, under the provisions of chapter 574 of the Laws of 1871, the state, through the commissioners of the land office, conveyed to the city lands under water in said river out to a line parallel with and three hundred feet outside of the bulkhead line so established. The city claims that, pursuant to said grants and statutes, it has become lawfully seized, and that it now owns in fee all the lands under water in front of the plaintiff's upland as far out into the river as the exterior line above mentioned. In 1887, a plan for the permanent improvement of the water front of the Harlem river between 94th and 95th streets and the adjacent neighborhood was determined upon and adopted by the commissioners of docks and approved by the commissioners of the sinking fund pursuant to chapter 517 of the Laws of 1884. The defendants, conforming to said plan, are now building a sea wall along the waters of the Harlem river beyond the line of low-water mark between 94th and 95th streets, and are filling in behind said wall and expending thereon large sums of money. They intend to continue and complete the wall in conformity to said plan.

The premises claimed by the plaintiff consist in part of lands made entirely out of the Harlem river and in part of lands still under water, all of which, at the date of the Nichols patent in 1667, was either between high and low-water mark or else was land under water out in that stream beyond the tideway. The filling in of this land was done pursuant to said legislation for the improvement of the water front of the city of New York, and is in accordance with the plan adopted by the dock department. The outer portion of said improvement consists of bulkheads, docks and piers, traversed by a marginal street 125 feet wide, running parallel with the river and situate below the old low-water mark. Between said marginal street and plaintiff's uplands there is a piece of filled-in land, comprising part of the block lying between 94th and 95th streets, which is not appropriated by said plan and improvement to any public use. No proceedings have been taken to acquire any property or rights of the plaintiff, nor has compensation been made to him or provided for his benefit. The main issue, according to the pleadings and the facts agreed upon by the parties, relates to the title to these constructed premises, being the bulkhead, docks and piers, the lands covered by the marginal street, and those unappropriated to public use, all of which the plaintiff claims under the Nichols charter, while the defendants claim the same under the Dongan and Montgomerie charters, and the various acts of the colonial and state legislatures relating to the subject, as confirmed by the Constitution of 1777. According to the deeds constituting the chain of plaintiff's title to the upland, the grants ran to high-water mark until 1852, when a conveyance running to low-water mark was given, and in 1861, when the plaintiff took title, his conveyance purported to cover the lands under water as far out as the bulkhead line established by the harbor commissioners. No claim is made that the plaintiff, as owner of the upland, has applied to the sinking fund commissioners for any grant of the land in controversy.

Upon these facts, which were stipulated, the plaintiff asked at the trial, the demand in the complaint being somewhat

broader, that the defendants should be restrained from using said docks and bulkheads and the lands covered by the marginal street until compensation should be made to him therefor, and that he be adjudged to have title in fee simple absolute to the intermediate piece of land lying between the marginal street and his upland not appropriated by the plans of the defendant, or the statutes of the state, to any public use.

The Special Term dismissed the complaint, holding that the title of the plaintiff under the ancient grants ran only to high-water mark; that his riparian rights as owner of the uplands were subordinate to the right of the public authorities to build thereon and make improvements below low-water mark essential to navigation and commerce without compensation, and that the acts of the defendant were not unlawful.

The judgment entered upon the decision of the trial court was affirmed by the Appellate Division, one of the learned justices dissenting (10 App. Div. 294), and the plaintiff now comes here.

William C. De Witt for appellant. The title of the plaintiff vested in him all the rights and easements upon the river incident to riparian ownership under the most favorable circumstances. (*Hedges v. W. S. R. R. Co.*, 150 N. Y. 156; *Van Dolsen v. Mayor, etc.*, 21 Blatchf. 455; *Mayor, etc., v. Hart*, 95 N. Y. 457.) The mayor, aldermen and commonalty of the city of New York in the construction of streets, wharves, docks and piers upon the tideway granted to them by the Dongan and Montgomerie charters are bound in law to compensate riparian owners for all damages thereby inflicted upon their estates. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75; *Buccleuch v. M. Bd. of Works*, L. R. [5 E. & I. App.] 418; *St. Louis v. Rutz*, 138 U. S. 246; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 184; *Ashby v. Eastern R. R. Co.*, 5 Metc. 368; *S. E. Co. v. Steamship Co.*, 12 R. I. 348; *Chapman v. O. & M. R. R. Co.*, 33 Wis. 629; *Delaplaine v. C. & N. W. R. Co.*, 42 Wis. 214; *Holton v. Milwaukee*,

31 Wis. 38; *Brisbine v. S. P. & S. C. R. R. Co.*, 23 Minn. 114.) The construction of the marginal street, constituting the second class of land erected out of the water, cannot, by any sound construction, be included in the water grants contained in the Dongan and Montgomerie charters, which must be in law, as they are in terms, confined to commercial uses; and the act of the legislature authorizing the construction of this street is subject to the constitutional provisions requiring compensation to be made where private property is taken or where damages are inflicted upon private rights. (*Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 274; *Smith v. City of Rochester*, 92 N. Y. 477; *Ledyard v. Ten Eyck*, 36 Barb. 102.) The intermediate piece of land unappropriated to any public use, lying between the interior line of the marginal street and the upland banks of the riparian owner with which it is actually intermingled, is to be treated as alluvion or reliction or accession, and has become in law and equity the property of the plaintiff. (*St. Clair County v. Lovington*, 23 Wall. 66; *New Orleans v. United States*, 10 Pet. 662; *Saulet v. Shepherd*, 4 Wall. 502; *Schools v. Risley*, 10 Wall. 110; *King v. Yarrowborough*, 3 D. & C. 178; *Steers v. City of Brooklyn*, 101 N. Y. 56; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Gould on Waters*, 314, § 155; *Adams v. Frothingham*, 3 Mass. 362; *Hulsey v. McCormick*, 18 N. Y. 147; 3 Washb. on Real Prop. 65; *Gould v. H. R. R. Co.*, 6 N. Y. 522.) The defendant having mapped, taxed and assessed the unappropriated lands as the property of the plaintiff and not the property of the city, and especially having, by judicial procedure, caused said lands to be assessed for moneys to be devoted to the purchase of lands for parks and streets, to be owned by it in fee simple, and having collected such taxes and assessments from the plaintiff, and, furthermore, having sold to the plaintiff the said land by a good and sufficient deed of conveyance in the form of a lease for 1,000 years, given in writing for an adequate consideration, the title to said lands must be adjudged in the plaintiff, as against the defendant, and the defendant is estopped from claiming the same.

(*Dunham v. Townshend*, 43 Hun, 580; 118 N. Y. 287; *Embury v. Conner*, 3 N. Y. 511; *Sherman v. McKeon*, 38 N. Y. 274; *Bartholomew v. Finnemore*, 17 Barb. 428.)

Francis M. Scott for respondent. The land in the tideway is owned in fee absolute by the defendant. (Dongan charter of 1686, § 3; *Towle v. Remsen*, 70 N. Y. 303; *Furman v. Mayor, etc.*, 5 Sandf. 16; 10 N. Y. 568; *Mayor, etc., v. Hart*, 95 N. Y. 443; *Mayor, etc., v. Mott*, 60 Hun, 423.) The land in question belonging to the city is subject to no easement. (4 Coke Inst. 36; 1 Black. Comm. 90, 160, 161, 224; *Comm. v. Alger*, 7 Cush. 53; *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Langdon v. Mayor, etc.*, 93 N. Y. 129, 155; Gould on Waters, § 21; L. 1732, ch. 584; Const. of 1777, §§ 35, 36.) The contention of the plaintiff that the grant to the inhabitants of Harlem being prior in time to the Montgomerie charter, therefore, plaintiff, holding under that grant, is entitled to some rights superior to those of the city in the tideway and land under water now in question is untenable. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mayor, etc., v. Hart*, 95 N. Y. 450; Gould on Waters [2d ed.], §§ 4, 19; *People ex rel. v. Jones*, 112 N. Y. 606; *N. Y. C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83; Gould on Waters [2d ed.], § 23.) Plaintiff has no claim based on accretion. (*Mulry v. Norton*, 100 N. Y. 424; *Halsey v. McCormick*, 18 N. Y. 147; *Blakeslee M. Co. v. B. S. I. Works*, 129 N. Y. 155; *N. Y. C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83.) The city's title to all the filled-in land between the bulkhead, as it was established under the act of 1852, and the present line of filling, has been the settled law since 1861, but if any property rights of the plaintiff have been destroyed, his only remedy is at common law for trespass. (*Van Zandt v. Mayor, etc.*, 8 Bosw. 375; *Williams v. Mayor, etc.*, 105 N. Y. 420; *Langdon v. Mayor, etc.*, 28 Hun, 170; 93 N. Y. 129; *Kingsland v. Mayor, etc.*, 110 N. Y. 569; *Green v. N. Y. C. & H. R. R. Co.*, 65 How. Pr. 160.) The taxes and tax sales by the city's officers do not

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estop the city from claiming title. (*Mayor, etc., v. Law*, 125 N. Y. 380; *Rossire v. City of Boston*, 4 Allen, 57; *City of St. Louis v. Gorman*, 22 Mo. 593; *McFarlane v. Kerr*, 10 Bosw. 249; *Elsworth v. Grand Rapids*, 27 Mich. 250; *People ex rel. v. Cassity*, 46 N. Y. 46; *Smith v. Mayor, etc.*, 68 N. Y. 552; *People ex rel. v. Comrs. of Taxes*, 82 N. Y. 459; *People ex rel. v. Board of Assrs.*, 93 N. Y. 308; *Baker v. U. M. L. I. Co.*, 43 N. Y. 283; *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157; *N. Y. & Oswego M. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Shapley v. Abbott*, 42 N. Y. 443; Bigelow on Estoppel [5th ed.], 626, 627.)

VANN, J. The lands granted by Governor Nichols to the inhabitants of the village of New Harlem were bounded on the east by the Harlem river, which was made by specific mention the limit of the conveyance in that direction. After the lands intended to be conveyed had been thus definitely bounded in the deed, a clause followed which, in the profuse language of ancient documents, described the appurtenances so fully as to give rise to the claim now made that the boundaries of the grant itself were enlarged thereby. As the western shore of the river below high-water mark consisted largely of "meadows, pastures and marshes," it is argued that by including those words, with many others, in the description of the appurtenances, it was intended to include the meadows, pastures and marshes adjoining the bank of the river as a part of the grant. Whatever force the argument might otherwise have, it completely fails in this instance, because the long description of appurtenances is ended and limited by the words "within the said bounds and limits set forth," thus making it clear that there was no intention to push the bounds of the grant out into the river or to extend them beyond its western bank.

When lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark, as the law stood at the date of the Nichols charter and as it stands to-day. (*Mayor v. Hart*, 95 N. Y.

443; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *Roberts v. Baumgarten*, 110 N. Y. 380; *Barney v. Keokuk*, 94 U. S. 324, 336; Hale's *De Jure Maris*, 96; Moore's *Foreshore and Seashore*, 782; 2 Blacks. Com. 347; Comyn's Dig. title Grant, G., 7, 12; Devlin on Deeds, § 1028; Gerard's Title to Real Estate, 851; Gould on Waters, § 175; 3 Kent's Com. 427, 432; 4 Am. & Eng. Encyc. of Law [2nd ed.] 820.) The grantees in that instrument, therefore, took title to the uplands lying upon the river, but not to the tideway or to any land below high-water mark. In other words, they became simply riparian proprietors upon tide water, with such title, rights and privileges only as belong at common law to the owners of upland washed by waters where the tide ebbs and flows. While the title of such owners did not extend beyond the dry land, they were entitled, as against all but the crown as trustee for the people at large, to certain valuable privileges or easements, including the right of access to the navigable part of the river in front for the purpose of loading and unloading boats, drawing nets and the like. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75, 87; Angell on Tidewater, 22, 64.) These riparian rights were property belonging to the riparian owner, who could not be deprived of them without his consent, or by due process of law, although he could only use them subject to the rights of the public. The title to the tideway and to the land beyond continued in the English crown, as a public trust, after the Nichols charter the same as before for nearly twenty years, and until the year 1686 when Governor Dongan granted to the city of New York all the land between high and low-water mark, and his grant was subsequently confirmed by Governor Montgomerie, by the colonial legislature and by the first Constitution. The title to the remaining lands now in controversy, still farther out in the river, continued in the crown as a prerogative right until by the Revolution and the treaty of peace between the colonies and England it passed to the state of New York, which subsequently, by various legislative acts and proceedings had

thereunder, granted it to the city of New York. (*Martin v. Wuddell*, 16 Peters, 367.) As all of these grants were made after the date of the Nichols charter, according to the general rule, they could have no effect upon the riparian rights of the grantees named therein, or of their successors in title, as that would violate vested rights by taking away property from one and giving it to another without due process of law. Whatever the common law may have been prior to *Magna Charta*, after the date of that venerable instrument, even the king of England could not grant to one subject that which he had already lawfully granted to another. While the English Parliament, being restrained by no constitution that it cannot override if it so wills, can take the property of an individual for public use without making compensation, it is not claimed that any of the grants under consideration were made pursuant to an act of Parliament. As the colonial governors and legislatures derived their powers from the crown, they could not interfere with private property any more than the crown itself. (*Martin v. Wuddell*, *supra*; *Johnson v. M'Intosh*, 8 Wheat. 595.) But while the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, when the interest of the whole people requires an improvement of the water front for the benefit of navigation and commerce, it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tidewater front for that purpose, without compensating the riparian proprietor, other than by giving him the pre-emptive right of purchasing in case of a sale. The foundation of the rule does not seem to have been clearly pointed out, although a review of the authorities demonstrates its existence.

In *Lansing v. Smith* (4 Wend. 9) it was held by the Court of Errors that the owner of lands adjacent to the shore of the Hudson river at Albany, who had erected a wharf upon the same after a grant of land under water from the commissioners of the land office, could not maintain an action on the

case against those to whom subsequently the legislature gave the privilege of erecting a pier in the river for the purpose of constructing a basin to protect boats, although such pier entirely encompassed the wharf on the side of the water so as to leave no communication between it and the river, except through a sloop lock at one extremity of the basin, and although the privileges of the owner of the wharf were materially impaired by the construction of the pier. The court declared his loss to be *damnum absque injuria*, and that the grant of the right to erect a wharf implies a reservation to the legislature of the right to regulate the use of it and of the adjacent waters. It was further held that the grant of the right to erect the pier, although subsequent to the former grant, did not violate that provision of the Constitution of the United States which provides that no state shall pass a law impairing the obligation of a contract, nor that provision of the Constitution of this state declaring that private property shall not be taken for public use without just compensation, and that the first grant did not preclude the legislature from making a great public improvement for the benefit of commerce without compensating the adjoining owner.

In *Furman v. Mayor, etc., of New York* the facts are imperfectly stated and the decision very meagre as reported in 10 N. Y. 567, but both are very full as reported in 5 Sandf. 16. In that case the legislature authorized the city of New York to lay out streets and wharves 70 feet wide in front of the East and Hudson rivers, and provided that they should be built according to a plan adopted by the city, by and at the expense of the owners of the land adjoining, in proportion to the breadth of their several lots, and that upon filling up and levelling the lands under water in front of their uplands to the extent provided, they should become the owners of the made ground in fee simple, and entitled to the cranage and wharfage. After compliance by the owner and a conveyance to him from the city of the new land thus made by wharfing out, the city, under authority from the legislature, tendered to him a grant of the land under water for a certain distance still

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farther out into the stream in front of his premises, with notice that if he refused to accept it at a certain valuation the said land would be granted to any person willing to take it. The statute under which this action was taken provided that after such a grant the grantee should build streets and wharves covering the land under water embraced in the grant. A bill was filed by the owner of the upland and of the made lands under the first grant to restrain the city from making the proposed second grant, but it was dismissed on the merits at the Special Term, and the judgment was affirmed at the General Term and by the Court of Appeals.

Upon the argument of the appeal the point was distinctly made that the plaintiff, as a riparian owner, had the right of ingress and egress to his water front; that the proposed action of the city would be an invasion of the rights of private property, and that he could not be deprived of that property without adequate compensation.

In *People v. N. Y. & S. I. Ferry Co.* (68 N. Y. 71) it was held that public grants to individuals, under which rights are claimed in impairment of public interests, are to be construed strictly against the grantee, who, although he can exclude all individuals from the permanent occupation of lands under tidewater held by him under such grant, cannot exclude the state, which still has the right to regulate the use of the premises in the interest of the public and for the protection of commerce and navigation. The court said: "Gore was the owner of the upland adjoining the lands under water embraced in the grant. The ownership of the adjacent upland, however, gave him no title to or interest in the lands under water in front of his premises. The title to lands under tideswaters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable

waters, which he could neither destroy or abridge. In every such grant there was an implied reservation of the public right. * * *

In *Towle v. Remsen* (70 N. Y. 303) it appeared that the city of New York, prior to 1807, had title to the tideway, and in that year the state granted it land under water in front of the tideway, with a proviso giving the pre-emptive right to the owners of adjacent lands in all grants made by the city of lands under water. In 1837 the city granted to one who claimed to be the owner of the upland the water lots in front, consisting partly of the tideway and partly of land below low-water mark, reserving certain rents payable annually and with a condition that if it should appear at any time that the grantee was not seized of an estate in fee simple of the adjoining land above high-water mark the grant should be void. The grantee did not in fact own the upland, and when this was established by litigation, the commissioners of the sinking fund canceled said grant, and in 1859 gave the plaintiff a conveyance of the same lots upon payment of the back rent. In an action of ejectment brought by the second grantee against the first, who had in the meantime constructed bulkheads and streets, the complaint was dismissed and the judgment of dismissal was affirmed by this court, which held that the city by accepting title to lands beyond the tideway with said proviso, did not consent to qualify its title to the tideway so that it could thereafter only grant land therein to the persons to whom it could grant the adjoining lands under water. It was further held that under the Dongan and Montgomerie charters the city had an absolute fee to the tideway and could grant it to any one that it chose, regardless of the wishes of the owner of the upland.

In *Mayor v. Hart* (95 N. Y. 443) the question to be decided was whether the owners of the uplands situated on the Harlem river in the former village of Harlem had an equitable claim to priority of purchase of lands under water in front of their premises in case the city sold the same, but incidentally the title to the tideway and the effect of the Nichols, Dongan and

Montgomerie charters was involved. The court held that the Nichols charter conveyed only to high-water mark, and that by the Dongan charter the city of New York acquired title to the tideway on the whole circuit of Manhattan island and held it as an absolute fee. By an interesting historical argument the court showed that Harlem was established as a village within the general limits of the city itself for the promotion of agriculture, and the recreation and amusement of the city of New Amsterdam, and drew the inference from the surrounding circumstances that the Nichols grant should receive a limited construction. In the language of Judge FICH, who prepared the opinion: "The city was to be the seaport, and for this purpose its water front was to girdle the island, while the village was meant for a rustic hamlet, whose inhabitants should own cattle rather than ships. Without pursuing the subject in its details it is enough to say that we have discovered no adequate reason for straying from the general rule in construing the Harlem patents, and are satisfied that the river line was at high-water mark, and so the city owned the tideway. Its title to so much of the lands in dispute as constituted the portion of the tideway adjacent to and in front of the upland owned by the defendants was thus established. That title in its origin was absolute. The city could sell the strip to whom it pleased, and it was unburdened with any pre-emptive privilege amounting to a legal right in any one." After referring to the pre-emptive right given by statute to owners under grants theretofore made by the city of lands beyond the tideway and to the equitable rights thereunder, the learned judge continued: "But those owning the upland in front of whom lay the absolute ownership of the city in the tideway, and who were already, or might be, cut off from the water by that ownership, had no such equity. A pre-emptive right in the extension without one in the tideway would do them no good by reason of that interposed strip, and would simply make the latter valueless to the city or its other grantee by in turn cutting off from both the water front." The court, with some hesitation, sus-

tained the equity of pre-emption claimed solely upon the ground that the city had granted both the filled-in land outside of the tideway, and a part of the tideway itself, to the claimant. This, however, was the utmost concession of rights to the riparian owner as is evident from the last sentence of the opinion: "If thus some little shred or faint shadow of riparian right on navigable waters is preserved in this state, through the sense of justice of the state and its municipal grantee, while on the longer coasts of other states the right is firmly pushed to low-water mark, and shielded by the law, we do not think the little thus gained is unwise, or inequitable, or an occasion of regret." Reference is made to the important case of *Whitney v. Mayor, etc.*, which, although decided in this court in 1855, is not reported in the regular series, but may be found in 6 Abb. New Cases, 329. (See, also, *People v. Tibbetts*, 19 N. Y. 523; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Kerr v. W. S. R. R. Co.*, 127 N. Y. 269, 277; *Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. 571, and *Van Zandt v. Mayor, etc.*, 8 Bosw. 375.)

These cases establish the absolute power of the city to improve the water front for the benefit of navigation, free from any interference by the riparian owner, whose sole right as against the state or its municipal grantee, as the trustee for the public, is the pre-emptive right to purchase, in case of a sale, when conferred by statute. While such are the strict powers of the corporation, in practice, it has used them with that forbearance and moderation that is naturally expected of government, whether state or local, acting for the benefit of all the inhabitants. There is no evidence in this case that the corporation intended to use any part of the lands in question for its private advantage, or for any purpose except to aid the commerce of a great city, and it was admitted by the learned counsel for the corporation in his argument of this appeal that the defendants could not lawfully use these lands except for commercial purposes.

The elementary writers follow the authorities cited. Thus, Mr. Gerard, in his valuable work on *Titles to Real Estate*,

says, referring to the state of New York : " It has been established in this state by judicial decision that the legislature of the state has an inherent right to control and regulate the navigable waters within the state. * * * The individual right of the riparian owner was considered * * * as subject to the right of the state to abridge or destroy it at pleasure by a construction or filling in beyond his outer line, and that, too, without compensation made." (P. 853, 4th ed. See, also, Gould on Waters, §§ 138, 143 ; Angell on Tidelwaters, 80 ; Moore's Foreshore & Seashore, 533 ; Hale De Portibus Maris, 85 ; De Jure Maris, 22.)

The cases in this state that are relied upon by the plaintiff do not vary the rule established by the line of authorities already referred to. The *Rumsey Case* (133 N. Y. 79), while it substantially overthrows the early case of *Gould* (6 N. Y. 522), does not pass upon the rights of a riparian proprietor as against the state itself, or one of its political divisions, in improving the water front of a great port for important public purposes. It simply decided that an owner of land on a public river can recover damages from a railroad company for building an embankment across his water front and depriving him of access to the navigable part of the stream. The court, however, was careful to limit its decision to the case then in hand, which was against a private corporation with private interests to serve, and to declare that the " principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution." The *Saunders Case* (144 N. Y. 75) was also against a domestic corporation, organized to make money for its stockholders by conducting the business of a common carrier of passengers and freight. It did not involve the right of the state to promote navigation by furnishing greater facilities for commerce. *Langdon v. Mayor, etc.* (93 N. Y. 129), and *Williams v. Mayor, etc.* (105 N. Y. 419), are not analogous, as they rest upon grants from the state of lands under water, with covenants for the enjoyment of wharfage,

acted upon at great expense by the grantee. The fact that no claim for compensation in those cases was made upon any other ground is significant. In *Yates v. Milwaukee* (10 Wallace, 497) much was said that favors the theory of the plaintiff, but all that was decided is that a wharf built by a riparian owner on the bank of a navigable river in the state of Wisconsin under a statutory permit cannot be declared a nuisance without a judicial trial. The later case of *Barney v. Keokuk* (94 U. S. 324) held that the public authorities may build wharves and make other improvements necessary to navigation below high-water mark upon navigable waters in the state of Iowa without the consent of the adjacent proprietor and without making him compensation. In other states some of the authorities are in accord, while others are opposed to the rule adopted in this state. (*Stevens v. Patterson & N. R. R. Co.*, 34 N. J. L. 532; *Payne v. English*, 79 Cal. 540; *Hess v. Muir*, 65 Md. 601; *Eisenbach v. Hatfield*, 2 Wash. 16; *Ladies' Seaman's Friend Society v. Halstead*, 58 Conn. 144; *Miller v. Mendenhall*, 43 Minn. 95; 8 L. R. A. 89; *Parker v. West Coast Packing Co.*, 17 Or. 510; 5 L. R. A. 61.) The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the state and in others to the riparian proprietors. This also accounts for the want of harmony in the Federal courts, as they follow the courts of the state where the case arose, unless some question arises under an act of Congress. (*St. Louis v. Myers*, 113 U. S. 566; *Barney v. Keokuk*, 94 U. S. 324, 340; *Willson v. Black Bird C. M. Co.*, 2 Pet. 245.) The only limitation that is placed by the courts of the United States upon the power of the several states over lands covered by tidewater within their respective limits is not for the protection of riparian owners, but to protect the public in the use of such waters and Congress in its paramount right to control navigation. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387.) While the case last cited is relied upon by the appellant it is really of little aid to him, as it simply announced the law of Illinois, but not that of New York.

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The case of the *Duke of Buccleuch v. Metropolitan Board of Works* (L. R. [5 E. & I. App.] 418), also much relied upon by the appellant, is not in point, because it turned upon the construction of the statute rather than upon the common law. In that case a lessee from the crown of land on the river Thames, including some land under water, claimed damages under an act of Parliament, which authorized the construction of an embankment along the river bank in front of his property for the purpose, not of navigation, but of making a new street. (25 & 26 Victoria, ch. 93.) The act required compensation to be made for such damage, if any, as should "be sustained by him by loss of river frontage, or otherwise by reason of such embankment and roadway, or other the exercise of any of the powers of the act." As no claim was made except under the act, which expressly recognized the loss of river frontage as the subject of damages, the case is not regarded as an important authority upon the question now before us, notwithstanding the somewhat sweeping language used in the decision.

While we think it is a logical deduction from the decisions in this state that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the state, as in the *Langdon* and *Williams* cases. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the state as trustee for the public, there is

reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public. Thus, when the king used to grant an exclusive right of fishing in navigable tidewater, as once he lawfully might, if, in the course of time, the nets or weirs interfered with navigation, they became a nuisance and could be abated as such. The grant was silent upon the subject, yet the courts held that whatever impeded the superior right of navigation was impliedly excepted from the effect of the grant. So, as it seems to me, when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare. The purpose for which the supreme authority holds the title to lands under tidewater is inconsistent with the power to grant any easement or right to those lands that will prevent it, when the necessities of commerce demand, from "wharfing out" to deep water, so that vessels can load and unload and the interests of navigation be promoted. It is a reasonable inference from the nature of the grant in question made by Governor Nichols, the circumstances surrounding him when it was made, the pursuits of the grantees, the situation of the port of New York with its growing commerce, that it was well understood by both parties that the gratuitous conveyance was not putting a curb on the commerce of the chief city of the continent for all time. Twenty years later, when his successor granted the tideway to the city of New York, with the right to build thereon, there seems to have been neither complaint nor question from the inhabitants of Harlem. Nearly two centuries had passed before any claim to the tideway was made in hostility to that grant, so far as we are

advised. The plaintiff now seeks to establish an easement over the tideway against the city, and in order to do so, he must also establish it against the English crown as well as the state of New York, and show that the sovereign, as *parens patriæ*, alienated a right that was essential to the most important public functions. We think that no such limitation upon the prerogative of the sovereign was intended, and that the conveyance of the uplands in question to a subject should, from public considerations of the highest importance, be held to have been made with the implied reservation of the right to freely improve the navigation of the great seaport, within the general limits of which said uplands were situated. The permanent control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention to that end, and in the absence of express language the strict construction required by law in favor of the sovereign, as trustee, limits the effect of the grant by reserving or excepting therefrom the right to fill in the land out to deep water and build wharves thereon in aid of navigation and as an indispensable incident to commerce. (*People v. N. Y. & S. I. Ferry Co., supra.*) This conclusion makes the riparian rights subordinate to those of the public for commercial purposes and leaves unfettered the commerce of the city of New York. The inconvenience to the riparian owner may, sometimes, be serious, but private convenience must often suffer in order to develop the highest utility of a great waterway. It may be safely assumed that no public authority will make an extreme or oppressive use of its rights or unnecessarily inflict injury upon a citizen.

Aside from the authorities cited and the inferences drawn therefrom, we see no answer to the claim of the defendants that the Dongan and Montgomerie grants were confirmed by the first Constitution adopted in this state. In 1732 the colonial legislature enacted "that all and singular, letters patent, grants, charters and gifts, sealed under the great seal of the colony of New York, heretofore made and granted unto the mayor, etc., of the city of New York, be, and are

hereby declared to be, and shall be good, valid, perfect, authentic and effectual in the law against the king's majesty, his heirs and successors, and all and every person and persons whomsoever, according to the tenor and effect of the said letters patent, grants, charters and gifts." (L. 1732, ch. 584.)

It cannot, in reason, be doubted that this specific act, confined to grants made to the city of New York, was intended, among other things, to confirm the Dongan and Montgomerie charters, the latter of which was less than two years old when the statute was passed. The effect of that act, standing alone, upon a grant made in violation of *Magna Charta*, it is unnecessary to now consider, for it was confirmed by the Constitution of 1777, which was the result of all the legislative power that the people of the state of New York, untrammelled by any higher law, could exert. The Constitution of the United States had not then been adopted, and the laws of England were no longer in force within the state, except as they were continued and confirmed by the Constitution of the state. There was no restriction, therefore, upon the power of the people to accomplish whatever could be effected through a fundamental act of legislation. The simple but weighty words of its first section were literally true, when it declared "that no authority shall on any pretence whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them." By the thirty-fifth section of that Constitution such acts of the legislature of the colony of New York as were in force on the nineteenth of April, 1777, which was the day before the Constitution was adopted, were continued in force and made the law of this state. The natural effect of this supreme enactment was to give the force of law to every unrepealed act standing upon the statute books of the colony. But the Constitution did not stop there, for by the next section it indirectly confirmed all grants of land made by the king, or by persons acting under his authority, prior to the fourteenth day of October, 1775, by providing "that all grants of land within this state made by the king of Great Britain, or by persons acting under his

authority, after the fourteenth day of October, 1775, shall be null and void; but that nothing in this Constitution contained shall be construed to affect any grants of land within this state made by the authority of the said king or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day." When the two successive sections, from which quotations have been made, are read in connection with the act of 1732, and in the light of the notoriety of the Dongan and Montgomerie charters, we think it was the intention of those who adopted our first Constitution, which did not require compensation for private property taken for public use, to ratify and confirm those grants, made for commercial purposes of the highest importance, and so essential to the prosperity of the city of New York.

If we have reasoned accurately thus far, the claim of title by the plaintiff, through alluvion or accretion, cannot be sustained. The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as the ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water and making it dry. (*Mulry v. Norton*, 100 N. Y. 424, 432; *Halsey v. McCormick*, 18 N. Y. 147; Angell on Tidewaters, 71; 1 Am. & Eng. Encyc. of Law [2nd ed.], 467.) The city was not a wrongdoer in filling up the water front and constructing piers, as its action was justified by its ancient charters as well as by legislation, to which there is no constitutional objection. The land thus made, without trespassing upon the rights of any one, did not become the property of the plaintiff through accretion, but remained the property of the city for the benefit of the public as dry land, just the same as when it was land under water. It is claimed that *Steers v. City of Brooklyn* (101 N. Y. 51) is in conflict with these views. In that case, however, the city of Brooklyn had wrongfully built a pier in front of plaintiff's premises, and it was held that the pier by accretion became added to the plaintiff's land in so far as it was in front thereof. Steers owned to the water line, and the city of Brooklyn, which had no ownership in the shore

waters as they had never been conveyed to it, had no right to build a pier in front of his premises. It was, therefore, a trespasser in thus building the pier and shutting him off from the water privileges which before he had enjoyed as an easement to his bulkhead and which he had a right to use as against the city of Brooklyn and all the world except the state, or its lawful grantee, acting for the public. An increase owing to the action of a wrongdoer is an exception to the doctrine that to gain title by accretion the growth must be by imperceptible degrees and through natural causes. The *Steers* case stands upon that exception and has no application to the case now before us. Here the increase was neither imperceptible nor unlawful, and hence the plaintiff took nothing therefrom, and, as we think, the defendants can be deprived of nothing thereby.

We have examined with great care all of the exceptions relied upon by the appellant, but we find none calling for a reversal, and the judgment should, therefore, be affirmed.

All concur, except GRAY, J., absent.

Judgment affirmed.

154	84
168	525

THOMAS J. CANAVAN, an Infant, by Guardian ad Litem, Appellant, v. ROBERT VAN R. STUYVESANT et al., Respondents.

APPEAL — REVERSAL BY GENERAL TERM — NEW TRIAL. On appeal from a judgment of a late General Term reversing a judgment in favor of an infant for damages for personal injuries alleged to have been suffered through the negligence of the defendants as owners of leased premises, and dismissing the complaint upon the merits, where there had been a motion for a new trial on the grounds that the verdict was against the weight of evidence and excessive, and the order of reversal did not state whether it was based on the law or the facts, *held*, that the reversal should be modified so as to order a new trial — it not appearing that other evidence might not be in existence which might materially change the facts.

Canavan v. Stuyvesant, 12 Misc. Rep. 74, modified.

(Argued June 18, 1897; decided October 12, 1897.)

APPEAL from a judgment of the Court of Common Pleas for the city and county of New York, entered May 8, 1895,

N. Y. Rep.]

Points of counsel.

reversing a judgment in favor of plaintiff entered upon a verdict, and dismissing the complaint upon the merits.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Jeroloman for appellant. The court below could not review any questions of fact in this case or entertain the motion for a new trial on the minutes. There is no statement in the case on appeal that the case contains all the evidence. (*Randall v. N. Y. E. R. R. Co.*, 76 Hun, 427; *Koehler v. Hughes*, 73 Hun, 167; *McAvoy v. Cassidy*, 8 Misc. Rep. 595; *Hyman v. Friedman*, 45 N. Y. S. R. 636; *Upington v. Pooler*, 47 N. Y. S. R. 30; *Aldridge v. Aldridge*, 120 N. Y. 614-616; *Katz v. Koster*, 6 Misc. Rep. 327; *Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415; *Spring v. C. M. L. Assn.*, 38 N. Y. S. R. 968; *Spence v. Chambers*, 39 Hun, 193; *Mullinoff v. Scherer*, 15 Civ. Proc. Rep. 160; *McCarthy v. Gallagher*, 4 Misc. Rep. 188.) The premises in question being a tenement house containing more than three families, the defendants had the right at all times to enter and make repairs, and were in duty bound to keep them in good, tenantable order and condition and the yards free from nuisances. (L. 1887, ch. 84; *Henkel v. Murr*, 31 Hun, 28; 2 *McAdam on Landl. & Ten.* 185-193; *Doyle v. Lord*, 64 N. Y. 436.) The defendants were the owners and landlords of the premises, and as such were in duty bound to keep the yards in a proper and safe state and condition at all times for the use and enjoyment of the tenants and their children, the same being appurtenant to the premises. (*Doyle v. Lord*, 64 N. Y. 432.) The Laws of 1887, chapter 566, make it mandatory upon owners and landlords to protect open areas. (*Driscoll v. Mayor, etc.*, 11 Hun, 101; *Timlin v. S. O. Co.*, 126 N. Y. 514, 525; *Embler v. Town of Wallkill*, 132 N. Y. 222.) A landlord of a tenement house is bound to keep the yards, halls, stairways, oilcloth, walls, ceilings, roof, coal holes, etc., in proper repair and safe condition, and is chargeable in damages to any one injured by a failure to do so, for maintain-

ing a nuisance upon his premises. (*Dollard v. Roberts*, 130 N. Y. 269; *Henkel v. Murr*, 31 Hun, 28; *Palmer v. Dearing*, 93 N. Y. 7; 2 *McAdam on Landl. & Ten.* 185, 191, 193; *Jennings v. Van Schaick*, 20 Abb. [N. C.] 324; 108 N. Y. 530; *Peil v. Reinhart*, 127 N. Y. 381; *Ahern v. Steele*, 115 N. Y. 203; *Timlin v. S. O. Co.*, 126 N. Y. 514.) It was not *per se* negligence on the part of the plaintiff's parents to allow plaintiff to play in the yard with his sister and other children. (*Kunz v. City of Troy*, 103 N. Y. 344; *McGarry v. Loomis*, 63 N. Y. 104; *McGuire v. Spence*, 91 N. Y. 306; *Birkett v. K. I. Co.*, 110 N. Y. 504; *Ames v. B., etc., R. R. Co.*, 4 N. Y. Supp. 803; *Canavan v. Stuyvesant*, 7 Misc. Rep. 113; *Schmidt v. Cook*, 4 Misc. Rep. 85.) The defendants were bound to assume and know that young children were likely to be at play in these yards, and that these cellar doors and areas would become the scene of their exploit and sports. (*Eurl v. Crouch*, 32 N. Y. S. R. 13; *Kunz v. City of Troy*, 104 N. Y. 344; *Schmidt v. Cook*, 4 Misc. Rep. 85; *Eurl v. Crouch*, 40 N. Y. S. R. 847.) The parents of the plaintiff are not chargeable with negligence in allowing him to play in either the front or rear yards with his four-years-old sister, or other children. (*Weil v. D. D., E. B. & B. R. R. Co.*, 119 N. Y. 147; *Birkett v. K. I. Co.*, 110 N. Y. 506; *Kunz v. City of Troy*, 104 N. Y. 344; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Meagher v. C. & C. V. R. R. Co.*, 75 Hun, 455; *Schmidt v. Cook*, 4 Misc. Rep. 85; *Ihl v. F. S. S. & G. S. F. R. R. Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 N. Y. 104.) The damages are not excessive, and the motion to set the verdict aside for that reason was properly denied. (*Minick v. City of Troy*, 19 Hun, 253; 83 N. Y. 514; *Althouse v. Sharpe*, 13 Wkly. Dig. 478; *Herbst v. V. O. Co.*, 40 N. Y. S. R. 558; *Gale v. N. Y. C. & H. R. R. R. Co.*, 13 Hun, 1; 76 N. Y. 594; *Valentine v. B. & S. A. R. R. Co.*, 16 N. Y. S. R. 602; *Rockwell v. T. A. R. R. Co.*, 64 Barb. 438; *Harrold v. N. Y. E. R. R. Co.*, 24 Hun, 184; *Commerford v. A. A. R. R. Co.*, 8 Misc. Rep. 599; *Solarz v. M. R. Co.*, 8 Misc. Rep. 656; *Dike v. F. R. Co.*, 45 N. Y. 113.) An appeal

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lies to the Court of Appeals when the General Term reverses and directs judgment absolute for the defendant. (*Goodwin v. Conklin*, 85 N. Y. 21; Code Civ. Pro. § 1338.) The court below committed no error prejudicial to the defendants, and, therefore, the verdict and judgment entered thereon should be affirmed with costs. (*Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Edgecomb v. Buckhout*, 146 N. Y. 332.) The General Term was not warranted in reversing, upon the ground that, in its opinion, the trial court should have reached a different conclusion. (*Baird v. Mayor, etc.*, 96 N. Y. 567; *Lowery v. Erskine*, 113 N. Y. 55; *Hewlett v. Elmer*, 103 N. Y. 156; *Hays v. Miller*, 70 N. Y. 113.) The defendants let the premises with a nuisance upon it, and are liable as for maintaining a nuisance. (*Ahern v. Steele*, 115 N. Y. 203; *Timlin v. S. O. Co.*, 126 N. Y. 514.)

J. Langdon Ward for respondents. The court below was right in reversing the judgment of the Trial Term, because, as to both causes of action, there was shown contributory negligence on the part of the plaintiff's parents, which must be attributed to him, and the court should have directed a verdict for the defendants, as requested. (*Kunz v. City of Troy*, 104 N. Y. 344; *Lehman v. City of Brooklyn*, 29 Barb. 234; *Hartfield v. Roper*, 21 Wend. 615.) No cause of action in favor of the plaintiff and against the defendants arose in respect of either alleged accident. (*McAlpin v. Powell*, 70 N. Y. 126; *Cusick v. Adams*, 115 N. Y. 55; *Ivay v. Hedges*, L. R. [9 Q. B. Div.] 80; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Jex v. Straus*, 122 N. Y. 293.)

HAIGHT, J. This action was brought to recover damages for personal injuries received by the plaintiff through the alleged negligence of the defendants.

The plaintiff resided with his parents at No. 341 East Thirteenth street in the city of New York. The premises were owned by the defendants and rented as a tenement house, the plaintiff's father occupying one of the apartments. There

were front and rear yards inclosed by fences. In the front yard there was a cellarway covered by two doors, which, when closed, were nearly flat and rested on stone walls. In one of the doors two boards had been broken out at the edge and within eighteen inches of the foot, leaving a hole about nine by twelve inches in size. This hole had existed from six weeks to two months, and the attention of the janitor employed by the defendants had been called thereto. In the rear yard there was an area about three feet by four feet in size and six feet deep, in front of a window opening into the cellar. The area had been covered by an iron grating resting upon a stone wall surrounding the area, but it had become so worn that the grating often became displaced. It had fallen into the areaway, which had remained open for about two months. The defendants' collecting agent's attention had been called thereto, and he had been requested to have the grating repaired so that it would stay in place. Both the front and the rear yards had been used by the children of the tenants as play grounds.

On the first day of July, 1891, the plaintiff, then an infant two years and three months of age, was in an adjoining yard. He was seen to crawl through the fence or railing between the yards at a point where some of the rails were out, and enter the yard in front of his residence. The cellar door with the broken boards was closed; the other one was open. After entering the yard he stepped upon the cellar door, walked diagonally across it, stepped into the hole broken through the door, fell through the open doorway into the cellar and fractured a bone in his wrist. He was unattended at the time of the accident. On the 4th day of November thereafter he was at play in the rear yard in company with a sister a year and a half older. She tossed a ball over his head, and he, in going back for it, fell into the area, receiving injuries which it is claimed have crippled him for life. The father was away from home, and the mother was engaged with her work in the house at a place where she could see her children in the yard through a window. The jury awarded the plaintiff as

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damages for the first injury one hundred dollars; for the second, seven thousand six hundred dollars. A motion for a new trial was made upon various grounds, among which was the claim that the verdict was against the weight of evidence and that it was excessive.

The General Term, in reversing the judgment, has not stated in its order whether the reversal was based upon the law or the facts; and had it followed the usual practice of ordering a new trial, no question would have been presented by this appeal for our review. (*Wright v. Hunter*, 46 N. Y. 409; *Chapman v. Comstock*, 134 N. Y. 509; *Mickes v. W. A. Wood M. & R. M. Co.*, 144 N. Y. 613; *Hoes v. Edison General Electric Company*, 150 N. Y. 87.)

Questions arising with reference to verdicts which are claimed to be excessive, or against the weight of evidence, are final in the General Term, and cannot be reviewed by this court. The General Terms were invested with broad powers with reference to the granting of new trials, even extending to cases in which they were satisfied that the verdict was against the weight of evidence, or was unjust. (*Roberts v. Tobias*, 120 N. Y. 1; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25-27.)

We are not, however, satisfied with the action of the General Term in ordering final judgment upon the merits, even if the evidence was not sufficient to justify the submission of the case to the jury, a question which we do not now decide. We are unable to say that other evidence may not be in existence which may materially change the facts with reference to these transactions. We, therefore, think that a new trial should have been ordered.

The judgment should be modified so as to order a new trial, and as so modified affirmed, with costs to abide the event.

All concur, except GRAY, J., absent.

Judgment modified.

154	90
158	101
154	90
168	52
168	348
154	90
j170	1585
171	155
s171	684

MATTHIAS RUPPERT, as Administrator of JOSEPH RUPPERT,
Deceased, Respondent, v. THE BROOKLYN HEIGHTS RAIL-
ROAD COMPANY, Appellant.

1. CIRCUMSTANTIAL PROOF. In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these facts.

2. NEGLIGENCE — CONNECTION OF DEFENDANT WITH CAUSE OF INJURY. To entitle the plaintiff to recover in an action for a personal injury, the evidence must show that the injury was the result of some cause for which the defendant is responsible. If, upon the testimony, it is as probable that the injury resulted from the act of another as from that of the defendant, the plaintiff cannot recover.

3. OBSTRUCTION IN STREET — UNCERTAINTY AS TO PARTY RESPONSIBLE. A recovery against a street railroad company for a personal injury caused by a paving stone lying upon a street near the railroad track is not warranted by proof that the defendant was paving between its rails and carting stones for the purpose, where it also appears that the stone in question differed in kind from those used by the defendant and was of the same kind as those being used by other parties in paving streets in the vicinity, and which they carted over the street in question.

Ruppert v. Brooklyn Heights R. R. Co., 89 Hun, 604, reversed.

(Argued June 24, 1897; decided October 12, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 3, 1895, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the death of plaintiff's intestate alleged to have been occasioned by the negligence of defendant.

The facts, so far as material, are stated in the opinion.

Thomas S. Moore for appellant. The proof offered by the plaintiff did not contain facts from which negligence on the part of the defendant could be legitimately inferred. (*Hea-*

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ney v. *L. I. R. R. Co.*, 112 N. Y. 122; *Dobbins v. Brown*, 119 N. Y. 188; *Riordan v. O. S. S. Co.*, 124 N. Y. 655; *Murphy v. Hays*, 68 Hun, 450; *Reiss v. N. Y. S. Co.*, 128 N. Y. 103; *Cosulich v. S. O. Co.*, 122 N. Y. 118; *Sheldon v. H. R. R. R. Co.*, 14 N. Y. 221; *Crist v. E. R. Co.*, 58 N. Y. 638; *Babcock v. F. R. R. Co.*, 140 N. Y. 308; *Flinn v. N. Y. C. & H. R. R. R. Co.*, 142 N. Y. 11; *Frace v. N. Y., L. E. & W. R. R. Co.*, 143 N. Y. 182.) In the doctrine of circumstantial evidence, it is equally essential that the facts exclude other inferences as that they should point to a particular conclusion. (*People v. Harris*, 136 N. Y. 429; *People v. Kennedy*, 32 N. Y. 146; *Sheldon v. H. R. R. R. Co.*, 14 N. Y. 221; *Crist v. E. R. Co.*, 58 N. Y. 638; *Babcock v. F. R. R. Co.*, 140 N. Y. 308.)

Henry A. Monfort for respondent. The evidence upon the part of the plaintiff was sufficient to establish the defendant's responsibility for obstructing the street by the paving stone occasioning the injury. (*Field v. N. Y. C. R. R. Co.*, 32 N. Y. 339; *Sheldon v. H. R. R. Co.*, 14 N. Y. 218.) The court did not err in allowing proof tending to show that the defendant was responsible for the loose paving block in the street, inasmuch as it allowed such stones to fall from its wagons at or near the place where the deceased was thrown from his wagon, shortly previous to that occurrence. (*Sheldon v. H. R. R. R. Co.*, 14 N. Y. 218; *Hinds v. Barton*, 25 N. Y. 544; *Field v. N. Y. C. R. R. Co.*, 32 N. Y. 339; *Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 424; *Briggs v. N. Y. C. & H. R. R. R. Co.*, 72 N. Y. 26.)

O'BRIEN, J. The plaintiff's son and intestate, who was about twenty-two years old, was killed on the 7th of August, 1893, while driving a team, hitched to a loaded wagon, through Grand street, which is occupied by the tracks of the defendant's railroad. The deceased was driving the team, seated upon an elevated spring seat in the front part of the wagon, and when turning off from the railroad track one of the front

wheels of the wagon came in contact with a paving stone in the street near the track, producing a jolt of the wagon which threw the deceased to the ground when one of the hind wheels passed over his body resulting in his death.

The presence of this stone in the street is assumed to have been the cause of the accident, and the judgment in this case rests upon no other ground than that the defendant negligently placed or left this stone in the street.

There is no question in the case with respect to the defendant's right to have its tracks in the street, nor as to the manner of operating the railroad. The simple issue of fact was whether the defendant had negligently placed or left an obstruction in the highway which was the proximate cause of the injury. This question was submitted to the jury and a verdict was found for the plaintiff. The only question presented by this appeal is whether there was any evidence to warrant a finding of negligence against the defendant.

The plaintiff's witnesses described the stone which came in contact with the wheel of the wagon as a granite paving block of light color, about one foot long, five or six inches wide, and about the same thickness.

The complaint alleges that the injury occurred in consequence of the negligence of the defendant in obstructing the highway with one of the granite paving blocks. There can be no doubt upon the evidence that the defendant was engaged in repaving the street between the rails about the time of the accident, and that the stone for that purpose was carted over Grand street, at the point where the accident happened, in the defendant's carts, by the defendant's servants. But it is equally clear upon the evidence that the defendant used no granite blocks for that purpose, but only cobblestones and Belgian paving blocks of a dark blue color. The granite blocks cost \$75 per thousand, while the Belgian blocks cost but \$11 per thousand, and the evidence in the case on the part of the defendant is quite clear, and substantially uncontradicted, that it did not use any of the more expensive stone to pave between the rails.

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It is also quite clear upon all the proofs that for some months before the accident the city or private individuals, or contractors for the city, had been engaged in paving streets in the vicinity of the place where the accident occurred, with granite paving blocks similar to the one which came in contact with the wagon wheel, and that such blocks had been conveyed over this street in carts. There was no direct evidence in the case as to where this particular paving block came from, or as to how it came to be in the street, or the parties who left it there. No one had seen it drop from the defendant's carts or had otherwise traced it to the defendant.

The jury was permitted to find that the defendant was responsible for the obstruction solely upon circumstantial evidence. The circumstances were, that the defendant was engaged in paving between the rails, and was obliged to convey the materials for that purpose. It was absolutely necessary in this case to prove two facts before the defendant could be adjudged liable for the result of the accident. These facts were: (1) That the defendant or its servants produced the obstruction by allowing the stone to fall from the carts or by placing it there or leaving it there; (2) the mere fact that it dropped from some of the carts in use by the defendant for drawing the paving stones would not, standing alone, make out the case. The plaintiff was also bound to show that this resulted from careless or improper loading, or some other careless or negligent act of the defendant's servants, since it had a perfect right to use the highway for the purpose of conveying the stones to the point where they were used. It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established and to exclude any other hypothesis fairly and reasonably. It has been said that circumstantial evidence consists in reasoning from facts which are known or proved, in order to establish such as are conjectured to exist, but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion

depends itself upon conjecture. (*People v. Kennedy*, 32 N. Y. 141.)

In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these facts. (*People v. Harris*, 136 N. Y. 429.)

The only circumstance which the plaintiff proved in this case was that the defendant about the time of this accident was engaged in drawing paving stones over this street, and the inference which is sought to be drawn from that circumstance is that this granite paving block dropped into the highway from one of the carts through the negligence of the defendant's servants. But it appears that while the defendant was so engaged in moving the paving stone it was not using or moving any stone of this character and that other parties were. Hence the reasoning process is defective since it is at least as reasonable to suppose that the stone in question was left in the street by the careless act of the parties who were using and moving this kind of stone as by the defendant who was not. This hypothesis was of course much more reasonable; and so the question arises whether a verdict based entirely upon such circumstantial evidence should be permitted to stand.

It is a settled principle in the law of negligence which, it has been said, should never be lost sight of, that when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, the case should not be submitted to the jury since, in such a case, the evidence fails to establish the essential fact. (*Bauleo v. N. Y. & H. R. R. Co.*, 59 N. Y. 357.)

The jury could, no doubt, have attributed the presence of the stone in the street to the careless act of the other parties who were using granite paving stones with as much reason as they have attributed it to the act of the defendant. The cir-

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Statement of case.

circumstances would warrant that inference quite as clearly as the other, but the verdict imputes that fault to the defendant against the legal rule which governs the determination of facts upon circumstantial evidence. The case is one, we think, where it appears that the primary cause of the injury proceeded from one of two sources, or was produced by one of two agencies for one of which the defendant might be responsible, but not for the other. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible. If, upon the testimony, it is just as probable that the injury resulted from the act of the other parties engaged in paving as from that of the defendant, the plaintiff cannot recover. (*Searles v. Manhattan Railway Co.*, 101 N. Y. 661.)

The testimony in this case subjects the judgment to the operation of this rule, and so, we think, it must be reversed and a new trial granted, costs to abide the event.

ANDREWS, Ch. J., GRAY and HAIGHT, JJ., concur; BARTLETT, MARTIN and VANN, JJ., dissent.

Judgment reversed.

154	95
156	587
154	95
5172	878

THE PEOPLE OF THE STATE OF NEW YORK v. THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

In the Matter of the Claim of R. STUART MILLER, Guardian, etc., Appellant, v. WILLIAM T. GILBERT, Receiver, Respondent.

CLAIMS AGAINST DISSOLVED LIFE INSURANCE COMPANY—DATE OF VALUATION. Claims under policies of a life insurance company which has been dissolved for insolvency and placed in the hands of a receiver, in an action instituted by the attorney-general, must be valued and determined, and their status fixed, as of the date of the commencement of the action for dissolution, and are not affected by the death of the insured after that date and before the distribution of assets.

People v. Com. Alliance Life Ins. Co., 17 App. Div. 376, affirmed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL, by certification, from an order of the Appellate Division of the Supreme Court in the first judicial department, made May 7, 1897, which affirmed an order of Special Term overruling exceptions to the report of a referee and confirming the same.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edgar J. Nathan for appellant. The Miller policies are entitled to a dividend on their face value, deducting only the premiums remaining unpaid at the time of the death of the insured. (*People v. S. L. I. Co.*, 78 N. Y. 114, 129; *Atty.-Gen. v. G. M. L. I. Co.*, 82 N. Y. 336; *Atty.-Gen. v. N. A. L. I. Co.*, 82 N. Y. 172, 194; *Atty.-Gen. v. C. L. I. Co.*, 88 N. Y. 77, 80; *People v. E. M. L. I. Co.*, 92 N. Y. 105.) The Miller policies were in effect agreements to insure for life. (*McDougall v. P. S. Soc.*, 64 Hun, 515.)

Henry D. Hotchkiss for respondent. All equities are to be adjusted as of October thirteenth, when this action was begun. (*Dean's Appeal*, 98 Penn. St. 101; *Commonwealth v. Ins. Co.*, 162 Penn. St. 586; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Burden v. S. F. Assn.*, 147 Mass. 360; *Fogg v. Supreme Lodge, etc.*, 159 Mass. 9; *Mayer v. Atty.-Gen.*, 32 N. J. Eq. 815; *Fawcett v. Supreme Order, etc.*, 24 Law. Rep. Ann. 824; *Taylor v. N. S. M. Ins. Co.*, 20 Ins. Law J. 562; *People ex rel. v. L. & R. Assn.*, 150 N. Y. 94; *In re E. R. F. L. Assn.*, 131 N. Y. 355; *Fera v. Wickham*, 135 N. Y. 223.)

HAIGHT, J. This action was brought by the attorney-general on behalf of the People to have the defendant, the Commercial Alliance Life Insurance Company, adjudged insolvent, the corporation dissolved and its assets distributed. The action was commenced on the 13th day of October, 1894, and on that day notice was given of an application for the appointment of a receiver, and in the meantime a temporary

injunction was issued staying all proceedings on the part of the company and restraining the paying out or transferring of any of its property or the disposing of its assets. October 30th a temporary receiver was appointed, and on January 10, 1895, final judgment was entered dissolving the corporation and appointing a permanent receiver. The company had previously issued to Thomas Miller two policies of insurance in the sum of \$5,000 each, known as the yearly renewable term policies, on which the premiums were payable bimonthly. One policy was issued to Marian M. Miller and the other to Ellen Miller, the daughters of Thomas Miller. He died January 15th, 1895, five days after the final judgment dissolving the corporation. The premium had been paid up to the first day of December, 1894, the last payment having been made October 1st, 1894. The claimant, as guardian for these daughters, insists that the value of the policies should be based on the fact of the death of Miller. The referee refused to compute the claim upon this basis, holding that no rights of creditors could be changed or enlarged after the commencement of the action by the attorney-general to dissolve the corporation, and that the claimant's status as a creditor was fixed as of that date and he reported accordingly. The report was confirmed at Special Term and affirmed in the Appellate Division. In allowing the appeal to this court the following has been certified for our determination: "Whether the claims filed by R. Stuart Miller, guardian, etc., under the two policies issued to Thomas Miller for \$5,000, should be allowed by the receiver of The Commercial Alliance Life Insurance Company at their value to be ascertained and determined by considering the fact of the death of said Thomas Miller which occurred on January 15th, 1895, after the dissolution of said corporation, but before proofs of claim were duly filed; or whether the amount of said claims must be fixed and determined on and as of said 13th day of October, 1894, when proceedings for the dissolution of said corporation were initiated and without regard to the subsequent death of the assured."

We think this question is fully answered in the case of *Equitable Reserve Fund Life Association of the City of New York* (131 N. Y. 354), and in that of *Life and Reserve Association of Buffalo* (150 N. Y. 94). It is true that in these cases the constitution and by-laws of mutual benefit associations were under consideration by the court, but we are unable to see why the conclusion reached in those cases does not apply with equal force to that now under consideration. The attorney-general, acting under the authority conferred upon him by the statute, brought the action to have the charter of the defendant annulled. On the same day he procured a temporary injunction restraining the company practically from doing business until a receiver could be appointed, and within a few days thereafter procured the appointment of a receiver. It was the arm of the law taking hold of a corporation for the purpose of stopping its business and distributing its assets. Judgment was subsequently entered for the relief demanded, establishing the charge that the corporation was insolvent at the time the action was commenced. The judgment relates back to the commencement of the action and became effective as of that time, and thereafter the company could not require the payment of premiums or insist upon forfeitures. It is the day on which the court practically takes possession of the assets of the company for the purpose of distribution among its creditors, and consequently is the day on which the rights of creditors should be ascertained and the value of their claims determined. We are aware that this rule must, of necessity, result in some hardship. The health of policyholders may, in some instances, become impaired and to such an extent that they may be unable to reinsure in other companies. Disease may have so far advanced in some as to make it reasonably certain that death will not be long postponed, and yet it would be wholly impracticable, if not physically impossible, to enter upon the examination as to the physical condition of every policyholder of an insolvent company, and would so far retard and delay the distribution of the assets as to make its administration practically impossible. Individual claims must, there-

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fore, give way to the greater claims of the masses, and to a wise public policy which demands an early distribution of the assets. In the case of *The Equitable Reserve Fund Life Association* (*supra*) PECKHAM, J., in delivering the opinion for the court, says: "In this case the proceeding had for its end the dissolution of the company. We hold that after the commencement of the proceedings no assessments need be levied or paid, and if the proceedings terminate in dissolution, the status of the claimants at the commencement of the proceedings is the proper one upon which to base the distribution. If not dissolved, other considerations obtain which the court in such a case will give the proper weight to." And again he says: "The holders of death claims must also have their status defined as of the date of the commencement of the proceedings, which date is the same, I believe, as the appointment of the temporary receiver. Those certificate holders who died after that date have no claims upon the death fund, but their representatives share in the reserve fund as already stated."

In the case of *Carr v. Hamilton* (129 U. S. 252) it is said: "By that act (the insolvency and going into liquidation) the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policyholders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate *pro rata* in its assets. * * * A settlement of the company's affairs cannot be postponed to await the determination of every contingency on which its policy engagements are suspended. This would postpone a settlement for at least half a century. Every person's interest in life insurance is capable of instant and present valuation, almost as certain and determinate as the discount of a note or bill payable in the future. Tables of mortality and of all values dependent thereon are adopted by every company, and furnish an assured basis of computation for this purpose."

In *Dean & Son's Appeal* (98 Pa. St. 101) it is said: "We see no reason why the same principle (referring to the rights of creditors in a voluntary assignment as being fixed as of

the date of the assignment) shall not be applied to the case of an insolvent corporation which has been dissolved by a decree of the court. The corporation is dead for every purpose. But one duty remains, and that is to distribute its assets among its creditors, even this the corporation is powerless to do, and the act of assembly devolves that duty upon a receiver to be appointed by the court. Who are the creditors entitled to participate in the distribution? Clearly those who were such at the time of the dissolution of the corporation. At that time the appellants were creditors to the extent of the premium they had paid. Beyond this they had no claim upon their policy, for no loss had occurred. A possibility of loss in the future would not be a claim upon the assets, and if it were it would be common to all policyholders. The distribution of the assets was an immediate duty on the part of the receiver. Its delay is due merely to the fact that time is necessary to realize them. If, therefore, distribution had been practicable immediately after the appointment of the receiver the appellants would have received only a dividend upon the premium they had paid. Does the fact that the distribution was necessarily delayed change the rights of the parties, and introduce a new class of creditors who were not creditors at the time of the dissolution? We find neither reason nor authority for such a proposition." (See, also, *Burdon v. Mass. Safety Fund Assn.*, 147 Mass. 360; *Fogg v. Supreme Lodge of United Order of Golden Lion*, 159 Mass. 9; *Commonwealth v. Am. Life Ins. Co.*, 162 Pa. St. 586; *Ingersoll v. Missouri Valley Life Ins. Co.*, 37 Fed. Rep. 530, and *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24.) We are aware that the earlier cases in this court are not in complete accord with the views herein expressed (see *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114; *Atty.-Gen. v. Guardian Mutual Life Ins. Co.*, 82 N. Y. 336, and *Atty.-Gen. v. Continental Life Ins. Co.*, 88 N. Y. 77); but upon a careful review of the question we have reached the conclusion that the later authorities should be followed.

The answer to the question certified is that the claims must

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be fixed and determined on and as of the 13th day of October, 1894, when the proceedings for the dissolution of the corporation were initiated and without regard to the subsequent death of the assured.

The order appealed from should be affirmed, but, under the circumstances, without costs.

All concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE WIEBUSCH AND HILGER COMPANY (Limited), Respondent, v. JAMES A. ROBERTS, as Comptroller of the State of New York, Appellant.

1. CORPORATION TAX — BASIS, WHEN NO DIVIDENDS OR SALES OF STOCK. The basis for assessing the tax under chapter 542, Laws of 1880, as amended before 1896, upon the capital stock employed in this state of a corporation which has paid no dividends, and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock.

2. ACTUAL VALUE OF CAPITAL STOCK. The actual value of the capital stock of such a corporation is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business, including its right to conduct it under its franchise.

People ex rel. Wiebusch Co. v. Roberts, 19 App. Div. 574, affirmed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered July 17, 1897, which reversed the proceedings of the state comptroller upon the return to a writ of certiorari to review a revision of the tax of the relator, made by the comptroller.

The tax imposed upon the relator was in pursuance of the provisions of chapter 542 of the Laws of 1880, as subsequently amended, before 1896.

The relator is a domestic corporation, and during the year ending November 1, 1895, was engaged in business in this

state. On the twenty-third of that month it made a report to the comptroller, stating fully its business transactions within the state. It stated that it possessed no real estate within this state; that the authorized capital of the company was two hundred and fifty thousand dollars, and the number of shares twenty-five hundred; that that number was issued, and their par value was one hundred dollars each; that the capital was paid in in good will, property and money to the amount of two hundred and fifty thousand dollars; that no dividends had been declared; that it was engaged in foreign commerce, in the sale of goods and in manufacturing without the state; that the capital stock employed within the state was \$67,300.09, and that there were no sales of its stock during the year.

It also stated that the value of the goods not imported, which were carried in stock by the company, was \$173,333.34; that its average bank balance was \$5,000; that the value of its office furniture and fixtures, was \$1,309.75; that the average value of its accounts, credits and bills receivable, including the portion received from business of foreign commerce, was \$97,500; that the goods imported by it remaining in original packages were of the value of \$10,200; that the value of its plant used in manufacturing in Bridgeport, Conn., was \$18,102; that the entire value of its gross assets was \$305,445.09; that its liabilities in open accounts were \$144,700, and its bills payable were \$44,643, making its total liabilities \$189,343, and its net assets \$116,102.09.

Upon the receipt of this report from the relator, the comptroller assessed it on its capital stock, valuing it at the sum of \$230,000, and establishing the tax at the sum of \$345. Subsequently, upon the petition of the relator and upon its complying with the provisions of the statute, a resettlement of the tax was had before the comptroller, when the relator's capital was appraised at \$193,400, and the tax reduced to \$290.10.

The Appellate Division held that it was only upon the balance, \$98,000.09, that the comptroller was entitled to tax the relator, except that it might be assessed for the value of the good will of its business, and when that was determined, such

value, added to \$98,000.09, was the value upon which the franchise tax of one and one-half mills was to be assessed.

G. D. B. Hasbrouck for appellant. By the term capital as used in the Corporation Franchise Tax Law is meant the store, stock or property with which the corporation transacts its business up to the sum at which it is capitalized. (Cooley on Taxn. 2, 17; *People ex rel. v. Barker*, 147 N. Y. 31; *M. Ins. Co. v. Bd. Suprs.*, 4 N. Y. 442; *I. L. Ins. Co. v. Comrs.*, 28 Barb. 318; *Williams v. W. U. T. Co.*, 93 N. Y. 162; *People ex rel. v. Roberts*, 82 Hun, 314; *People ex rel. v. Wemple*, 138 N. Y. 588; *People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Wemple*, 133 N. Y. 323; *People ex rel. v. Wemple*, 150 N. Y. 46.)

John B. Green and *Edmund L. Cole* for respondent. To ascertain basis of assessment, the indebtedness of the relator should have been deducted. (L. 1880, ch. 542, § 11; L. 1885, ch. 501; *People ex rel. v. Wemple*, 78 Hun, 63; 150 N. Y. 48, 50; *People ex rel. v. Campbell*, 66 Hun, 146; *People ex rel. v. Wemple*, 138 N. Y. 582; *People ex rel. v. Wemple*, 133 N. Y. 323; *People ex rel. v. Roberts*, 4 App. Div. 288; *People v. Comrs. Taxes*, 23 N. Y. 192-219; *People ex rel. v. Coleman*, 126 N. Y. 433; *New Orleans v. Houston*, 119 U. S. 265; *Penna. v. S. O. Co.*, 101 Penn. St. 119; *Williams v. W. U. T. Co.*, 93 N. Y. 188; *People ex rel. v. Coleman*, 112 N. Y. 565; *People ex rel. v. Barker*, 139 N. Y. 55; *Shelby Co. v. U. P. Bank*, 161 U. S. 149-161; *Farrington v. Tennessee*, 95 U. S. 686.) So much of the capital stock as was employed in foreign commerce is not the subject of taxation. (*Brown v. State of Maryland*, 12 Wheat. 441; *Low v. Austin*, 13 Wall. 110; *Almy v. California*, 24 How. [U. S.] 173; Const. U. S. art. 1, §§ 8, 10; *People v. E. T. Co.*, 96 N. Y. 388; *People ex rel. v. Wemple*, 138 N. Y. 1; *Moran v. New Orleans*, 112 U. S. 69; *Fargo v. Michigan*, 121 U. S. 230; *Brennan v. City of Titusville*, 153 U. S. 289.) The tax not being a property tax, is in violation of the Constitution of the

United States. (*H. Ins. Co. v. New York*, 134 U. S. 594; *People ex rel. v. Wemple*, 129 N. Y. 558, 564; *People ex rel. v. Campbell*, 74 Hun, 210; *People ex rel. v. Roberts*, 152 N. Y. 59; *C. P. R. R. Co. v. California*, 162 U. S. 116; *A. E. Co. v. Kentucky*, 166 U. S. 180; *C., C.; C. & St. L. R. R. Co. v. Buckus*, 154 U. S. 439; *H. B. Co. v. Kentucky*, 166 U. S. 151; *A. E. Co. v. Ohio*, 166 U. S. 215; *Crutcher v. Kentucky*, 141 U. S. 47.) The tax, if held to apply to domestic corporations, makes a distinction between domestic and foreign corporations, and imposes a burden upon the domestic that cannot be imposed upon the foreign, both being engaged in precisely the same business. (*Fargo v. Stevens*, 121 U. S. 230; *People ex rel. v. Wemple*, 138 N. Y. 1; *People ex rel. v. Campbell*, 74 Hun, 210.) Good will is not taxable as capital stock. (*W. U. T. Co. v. Poe*, 61 Fed. Rep. 449; *A. E. Co. v. Poe*, 61 Fed. Rep. 470; *People ex rel. v. Wemple*, 150 N. Y. 48; *People ex rel. v. Roberts*, 152 N. Y. 59; *People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Barker*, 146 N. Y. 304; 152 N. Y. 417; *People ex rel. v. Neff*, 15 App. Div. 585; *People ex rel. v. Wemple*, 133 N. Y. 329; *People ex rel. v. Assessors*, 80 N. Y. S. R. 299; Cooley on Taxn. [2d ed.] 83-389.)

MARTIN, J. The first section of the statute under which the tax in question was imposed required the relator in the month of November in each year to make a written report to the comptroller, stating specifically the amount of its capital paid in and the date, amount and rate per centum of each and every dividend declared during the year ending the first day of that month. After providing the procedure by which the tax should be fixed where there was a dividend which exceeded six per cent on the par value of the stock, it required the officers of the relator, where no dividends were declared, or they were less than six per cent, to estimate and appraise the capital stock of the company at its actual cash value, not less, however, than the average price for which the stock sold during the year, and when so estimated and appraised the com-

pany was required to forward to the comptroller a certificate thereof, accompanied with a copy of their oath or affirmation thereto.

Section three of that act provided that every such corporation doing business in the state should be subject to pay a tax upon its corporate franchise or business, to be computed, where no dividends were declared or they did not exceed six per cent, at the rate of one and one-half mills upon each dollar of the valuation of the capital stock made in accordance with the provisions of the first section.

Section eleven declared that the basis for a tax under the provisions of section three should be the amount of capital stock employed within this state.

The tax in this case was upon the corporate franchise or business of the relator, and not under the general tax laws of the state. If the question in this case had arisen under the latter, there would be no doubt as to the correctness of the determination of the learned Appellate Division, as it has been frequently held by this court that in determining the capital of a corporation for the purpose of general taxation the actual value of its corporate assets, less the debts and obligations of the corporation, is the true rule of assessment. (*People ex rel. U. T. Co. v. Coleman*, 126 N. Y. 433; *People ex rel. Roebblings' Sons Co. v. Wemple*, 138 N. Y. 582-588.)

The statute under which the question in this case arises was intended to provide for a tax upon the franchise and business of a corporation, instead of a general tax upon its capital stock as the law previously existed. Therefore, we must refer to the provisions of that particular statute to ascertain, if possible, the manner in which the assessment in such a case is to be made. It will be observed that such a corporation is required to estimate and appraise the capital stock upon which no dividend has been declared at its actual value in cash, not less than the average price at which the stock sold for during the year. Section three provides for the tax, and that it shall be at the rate of one and one-half mills on each dollar of the valuation of the capital stock made in accordance with the

provisions of the first section Section eleven limits the amount of capital stock upon which the tax is to be imposed to that portion which shall be employed in the state.

Thus, from the statute, it seems clear that two questions were to be determined: First, the amount of capital stock actually employed within the state, and, next, its value. It is to be observed that its value is to be determined in the manner specified in section one, which is absolutely required to be fixed at its actual cash value, except where stock has been sold during the year. In the latter event it must not be less than the price obtained. Simply stated, the provision of the statute is, that such of the capital stock of the relator as was employed in this state was subject to a tax which was to be based upon its actual value in cash.

The tax in this case could not be determined upon the basis of dividends, for the corporation had declared none; nor upon the price at which its stock sold, as no sales were made. How, then, was the comptroller to ascertain the basis upon which to assess the tax? Clearly by ascertaining the actual cash value of the capital stock employed in this state.

The record discloses the gross assets of the relator, its liabilities and the amount of its exemptions. Therefore, if the cash value of the capital stock liable to be taxed, is to be measured by the net assets of the corporation, after deducting its liabilities and the amount of its capital that is exempt, then clearly the decision of the court below was correct. So, also, in case there ought to be added to the net assets, after such deduction, the value of the good will of the business of the relator, the decision would still be correct, as that court has provided that upon a resettlement of the tax the value of the good will may be added.

The term or phrase "capital stock" has been several times under consideration by this court and its meaning defined, and the distinction between capital stock and shares of stock held by stockholders of a corporation has been pointed out, as will be seen in the following cases.

In *Williams v. Western Union Telegraph Co.* (93 N. Y.

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162-188) the question arose as to the meaning of the term "capital stock" in the provisions of the Revised Statutes prohibiting the directors of a corporation from making dividends except from the surplus profits of a corporation, and Judge EARL there said: "The 'capital stock' in this section does not mean share stock, but it means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. While the term 'capital stock' is frequently used in a loose and indefinite sense, in this section and in legal phrase generally, it means that and no more." He then cites *State v. Morristown Fire Association* (23 N. J. L. 195), where it was said: "The phrase 'capital stock' is very generally, if not universally, used to designate the amount of capital to be contributed for the purposes of the corporation. The amount thus contributed constitutes the 'capital stock' of the company." He then referred to *Burrall v. Bushwick R. R. Co.* (75 N. Y. 211), where Judge FOLGER defined "capital stock" as "money or property which is put in a single corporate fund by those who, by subscription therefor, become members of a corporate body," and, after referring to the definition of Vice Chancellor SANDFORD, in *Barry v. Merchants' Exchange Co.* (1 Sandf. Ch. 280), he added: "By loss or misfortune, or misconduct of the managing officers of a corporation, its capital may be reduced below the amount limited by its charter; but whatever property it has up to that limit must be regarded as its capital."

In the *Coleman* case Judge FINCH, in defining the words "capital stock" under the statute relating to general taxation, said: "The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholder is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise and the good will of an established and prosperous business." In *People ex rel. Singer Manufacturing Co. v. Wemple* (150 N. Y. 51), in discussing a similar question, BARTLETT, J., in effect, said that a

surplus necessarily exerted a controlling influence in fixing the amount of tax, as it either swelled the dividends or increased the valuation of the capital stock, thus indicating that the value of the capital stock was dependent upon the money or property owned by the corporation.

It is doubtless true that, as the decisions cited, except the last, were in cases where the question arose under other and different statutes, they are not to be regarded as controlling upon this question. Still, as they contain definitions of this phrase, they should have some weight in determining the general and accepted meaning of the words "capital stock." Moreover, the last case was a decision under this statute, and there is in it a clear intimation that the former decisions as to the meaning of the term were correct, and are, to some extent at least, applicable to a case like this.

We think that the statute practically defines the manner of determining the basis for the tax in this case. It in effect declares that the capital stock shall be appraised at its actual value in cash, and that is made the basis upon which the tax is to be assessed. We are of the opinion that the actual value of the capital stock of such a corporation is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business, including its right to conduct it under its franchise, and that the appellant's contention, that the liabilities of a corporation should not in such a case be deducted from its assets, cannot be sustained.

As the decision of the learned Appellate Division was to the effect that the tax against the relator should have been upon the sum of \$98,000.09, with the value of the good will of its business added, instead of \$193,400, it was substantially correct, and the determination of the comptroller was properly reversed.

The judgment and order of the Appellate Division should be affirmed, with costs.

All concur.

Judgment and order affirmed.

In the Matter of the Appraisal of the Property of THOMAS C. SLOANE, Deceased, under the Transfer Tax Act.

THE COMPTROLLER OF THE CITY OF NEW YORK, Appellant;
THE PRESIDENT AND FELLOWS OF YALE COLLEGE, Respondent.

1. **TRANSFER TAX — METHOD OF PROCEDURE.** The method of procedure in a proceeding for the ascertainment and determination of a transfer or inheritance tax is controlled by the statute on the subject in force at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute.

2. **APPLICATION OF ACTS OF 1887 AND 1892.** In a proceeding instituted in 1896, upon the determination of the particular estate, to ascertain the amount of the transfer tax upon a legacy in remainder under the will of a testator who died in 1890, the rights of the parties depend upon the statute as amended in 1887 (Ch. 713), but the method of procedure depends upon the statute of 1892 (Ch. 399).

3. **VALUATION FOR BASIS OF TAX.** The test by which a transfer or inheritance tax is to be measured is the value of the estate at the time of the transfer of title and not its value at the time of the transfer of possession.

4. **TIME OF TRANSFER OF TITLE.** The death of the testator is the time of the transfer of title to a legacy in remainder, when there is no uncertainty as to the person who will take in remainder, although there is uncertainty as to when the legacy will be paid over to the remainderman.

5. **VALUATION OF LIFE ESTATE.** The value of a life estate subject to determination by an event happening prior to the death of the life tenant and dependent wholly upon the volition of the latter (such as remarriage) cannot be ascertained until the estate has terminated.

6. **VALUE AT DATE OF TRANSFER.** The meaning and intention of the act of 1892 (Ch. 399, § 11) are that if an interest subject to the tax is of such a nature that its value cannot be ascertained immediately after its transfer, it is to be appraised at its fair and clear market value at the date of the transfer, whenever such value can be ascertained.

7. **DETERMINATION OF PRIOR ESTATE BY REMARRIAGE — APPRAISAL OF REMAINDER.** In a proceeding under the act of 1892, instituted on the determination of the particular estate by remarriage, to appraise a legacy given in remainder after the death or remarriage of the testator's widow, the title to which was transferred on the death of the testator, the value of the estate of the widow during the period of her widowhood is to be deducted from the principal of the fund.

Matter of Sloane, 19 App. Div. 411, affirmed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 15, 1897, affirming an order made by the surrogate of the city and county of New York, reversing his formal order entered upon the report of an appraiser appointed under the Transfer Tax Act.

The facts, so far as material, are stated in the opinion.

Enmet R. Olcott for appellant. The appraiser properly made his appraisal of the value of the trust fund and the legacy to Yale College as of the date of the remarriage of the decedent's widow, April 16, 1896. (*In re Milward*, 27 N. Y. Supp. 288; *In re Stewart*, 131 N. Y. 274; *In re Hoffman*, 143 N. Y. 330; *In re Curtis*, 142 N. Y. 219; *In re Roosevelt*, 143 N. Y. 120.)

Geo. C. Holt for respondent. The transfer tax is not a tax on property, but on the right of succession. Yale College, therefore, is not taxable on the actual value of the property which it now receives, but upon the value of its right of succession at the time of the testator's death. (*In re Swift*, 137 N. Y. 77; *In re Seaman*, 147 N. Y. 69; *In re Davis*, 149 N. Y. 539; *In re Bronson*, 150 N. Y. 6; *In re Langdon*, 11 App. Div. 220; 153 N. Y. 6; *In re Sherman*, 153 N. Y. 1; *In re Roosevelt*, 143 N. Y. 120; *In re Cager*, 111 N. Y. 343; *In re Milward*, 27 N. Y. Supp. 288.)

VANN, J. This appeal presents the question as to the correct method of computing, for the purpose of a succession tax, the value of a bequest made to Yale College in the will of Thomas C. Sloane, a resident of this state, who died on the 17th of June, 1890. The third paragraph of said will is as follows: "Third. I give and bequeath to William D. Sloane and Andrew Wright, both of the city of New York, the sum of four hundred thousand dollars, in trust, to keep the same invested, and to apply the net income thereof to the use of my said wife, by paying the same over to her quarterly during

her life or until her remarriage, and upon her death or remarriage I give and bequeath out of said principal sum of four hundred thousand dollars the sum of two hundred thousand dollars to the president and fellows of Yale College in New Haven; the sum of one hundred thousand dollars to my sister Euphemia Coffin, wife of Edmund Coffin, and the sum of one hundred thousand dollars to Mrs. Elizabeth W. Barnes, wife of Henry B. Barnes, and said trustees are to pay over and deliver the same accordingly."

Shortly after the death of the testator an application was made to assess the value of his estate for taxation under the Collateral Inheritance Act, which resulted in an order "that the tax on the remainder value of the principal sum of \$400,000, of which \$200,000 is bequeathed to the president and fellows of Yale College, \$100,000 to Euphemia Coffin and \$100,000 to Elizabeth W. Barnes, is not now determined." Priscilla Sloane, wife of the testator, who was 37 years of age at the time of his death, received the income from said legacy until the 16th of April, 1896, when she remarried, and the trust created by the third clause of the will was thereby determined. The proceeding now before us was instituted on the 18th of April, 1896, to cause a proper valuation of the estates, subject to taxation created by the clause in question, to be made and the lawful tax imposed. The appraiser reported his valuation of the property at the sum of \$400,000, less \$6,800 deducted for legal expenses and commissions, leaving the net value of the trust estate \$393,200, and the value of the legacy to Yale College, one-half of that amount, or \$196,600. The surrogate thereupon entered a formal order assessing the taxable interest of Yale College in the estate upon that basis, which, at the rate of five per cent on said amount, made the tax \$9,830. The college appealed to the surrogate, who reversed the order and remitted the matter to the appraiser to make a new report, with instructions to compute the value of the estate in remainder by deducting from said sum of \$196,600 the value of the particular estate of the widow for the term during which her widowhood actually

existed. Upon appeal by the comptroller to the Appellate Division that order was affirmed, and the case now comes here upon a further appeal brought by the comptroller.

The original act taxing the right of succession to legacies and inheritances in certain cases has been repeatedly amended in relation to the method of procedure to ascertain the amount of the taxes provided thereby. As it stood, when first enacted in 1885, it required the property passing under a bequest or devise to "be appraised immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent, * * * and after deducting therefrom the value of" any "life estate, or term of years, the tax prescribed by" the act on the remainder was declared to "be immediately due and payable." (L. 1885, ch. 483, § 2.) By section 13 provision was made for the appointment of an appraiser by the surrogate, whose duty it was to appraise the property at its fair market value, and the surrogate was then required to "forthwith assess and fix the then cash value of all estates, annuities and life estates, or term of years growing out of said estate, and the tax to which the same is liable."

In 1887, section two was amended so as to provide that, "when any grant, gift, legacy or succession upon which a tax is imposed by section first of this act, shall be an estate, income or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, at what was the fair and clear market value thereof at the time of the death of the decedent." (L. 1887, ch. 713, § 2.) Section 13 was also amended at the same time so as to provide that "the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value which are employed by the superintendent of the insurance

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department in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of life insurance companies."

In 1892 the act was still further amended so as to provide for an appraisal of contingent estates "immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time, provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable." (L. 1892, ch. 399, § 11.)

It is claimed by the appellant that the assessment in question is to be made in accordance with the provisions of the Laws of 1885, as amended in 1887. We have held, however, that the method of procedure in a proceeding for the ascertainment and determination of a transfer or inheritance tax is controlled by the statute on the subject in force at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute. (*Matter of Davis*, 149 N. Y. 539.) In that case the intestate died January 16, 1887, but the proceeding to ascertain the amount of the tax was not commenced until July 24, 1894, and we held that while the rights of the parties depended upon the earlier, the procedure was controlled by the later statute. According to this precedent, therefore, the rights of the parties now before us depend upon the statute as amended in 1887, but the method of procedure depends upon the statute of 1892.

The transfer or inheritance tax, so far as residents of the state are concerned, is not a tax upon property, but upon the right of succession to property, and hence the true test by which the tax is to be measured is the value of the estate at the time of transfer of title and not its value at the time of the transfer of possession. (*Matter of Davis, supra.*) As the particular estate of Mrs. Sloane was a life estate, subject

to determination during life by her remarriage, it was impossible to ascertain upon the death of the testator the value of the interest ultimately going to Yale College. The want of certainty was not as to who would take the remainder, as in certain cases relied upon by the appellant, but as to when it would be paid over. (*Matter of Stewart*, 131 N. Y. 274; *Matter of Curtis*, 142 N. Y. 219; *Matter of Roosevelt*, 143 N. Y. 120; *Matter of Hoffman*, 143 N. Y. 330.) While the value of a simple life estate can be computed as soon as it is called into existence, the value of a life estate subject to determination by an event happening prior to the death of the life tenant and dependent wholly upon the volition of the latter, cannot be ascertained until the estate has terminated. It is clear that the legacy to the college which, if payable immediately, was worth its face, was not worth its face if payable in the future, yet there was no basis upon which an appraisal could be made until the determination of Mrs. Sloane's estate by her death or marriage. The case, therefore, was fairly covered by the statute as amended in 1892, providing for an appraisal "immediately after such transfer or as soon thereafter as may be practicable." Still, whenever the appraisal is made, the value of the property is to be appraised according to the fair and clear market value of the interest at the time of the death of the testator. The words "in like manner" and "such value," as used in said act, admit of no other construction. The command of the statute as it stood when this proceeding was instituted, was to make the appraisal immediately after the transfer at the fair and clear market value thereof at that time, but if the interest was of such a nature that its fair and clear market value could not then be ascertained it was to be appraised in like manner, that is, at its fair and clear market value at the date of the transfer, whenever such value could be ascertained. We think, therefore, that the learned surrogate proceeded upon the correct basis when he reversed his former decree, directed a new appraisal and instructed the appraiser to deduct from the principal fund

the value of the estate of the widow during the term of her widowhood.

After this proceeding was instituted, and on the 27th of May, 1896, the act in relation to taxable transfers of property was incorporated in the General Tax Law after various amendments had been made thereto, one of which provided that "Whenever an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such limitation." (L. 1896, ch. 908, § 230.) As this act did not take effect until the 15th of June, 1896, it has no application to the proceeding now before us. (Id. § 281.) The trust estate had terminated before the new provision took effect. Moreover, as that provision only relates to the taxation of an estate for life or for years that can be divested by the act or omission of the legatee or devisee, it does not apply to an estate in remainder that cannot be so divested. The estate for life or for years alone is referred to when the statute says, "It shall be taxed as if there were no possibility of such a limitation."

We think the order of the learned Appellate Division affirming that of the surrogate was correct, and that it should be affirmed, with costs.

All concur.

Order affirmed.

In the Matter of the Application for the Removal of J. LEE HUMFREVILLE, as Executor of MARY J. HAVEMEYER, Deceased.

J. LEE HUMFREVILLE, Appellant; JENNIE BLANCHE HAVEMEYER CAMPBELL et al., Respondents.

1. SURROGATE'S COURT—CONTEMPT—IMPRISONMENT FOR NON-PAYMENT OF COSTS. Section 2555 of the Code of Civil Procedure, authorizing the enforcement of certain decrees of a Surrogate's Court by proceedings for contempt, does not apply to decrees for the payment of costs only; and as to such a decree a surrogate is subject to the general provision of section 15, prohibiting imprisonment for non-payment of costs except in the cases specified therein.

2. REMOVAL OF EXECUTOR—COSTS. When the only payment of money directed by a decree of a Surrogate's Court removing an executor is costs, it cannot be enforced by imprisonment.

Matter of Humfreville, 19 App. Div. 381, reversed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made July 2, 1897, which affirmed an order of the Surrogate's Court of the city and county of New York adjudging the appellant guilty of a contempt of court.

The facts, so far as material, are stated in the opinion.

Abram Kling for appellant. The surrogate had no power to direct the imprisonment of the appellant for the non-payment of costs and disbursements, as awarded by the Appellate Division of the Supreme Court. (*Sherwin v. People*, 100 N. Y. 358; Code Civ. Pro. §§ 2, 14, 16, 1991, 2007, 2481; *Watson v. Nelson*, 69 N. Y. 536; *Riggs v. Cragg*, 89 N. Y. 479; *G. P. & R. Mfg. Co. v. Mayor, etc.*, 108 N. Y. 276.) The claim that the surrogate had power, pursuant to section 2555 of the Code, to commit the appellant as for a contempt for the non-payment of costs, and section 15 of the Code has no application to the Surrogate's Court, is untenable. (Code Civ. Pro. §§ 15, 1769, 1773, 2554, 2555; *Hathaway v. Johnson*, 55 N. Y. 93; *Gibbs v. Prindle*, 11 App. Div. 470; *Tunstall v. Winton*, 31 Hun, 219; *Watson v. Nelson*, 69 N. Y. 537; *Branth v. Branth*, 13 N. Y. Supp. 360; *Lansing v. Lansing*, 4 Lans. 377.) There has been no adjudication that the appellant has refused to obey any order or decree of the surrogate, by which the rights and remedies of the respondents have been impeded or impaired. (*Bergin v. Deering*, 70 Hun, 381; *Fischer v. Raab*, 81 N. Y. 235.)

Henry H. Whitman for respondents. The decree of the surrogate of May 5, 1896, directing the payment of costs, may be enforced by contempt proceedings. (Code Civ. Pro. § 2583; *People ex rel. v. Bergen*, 53 N. Y. 404; *People ex*

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rel. v. Anthony, 7 App. Div. 132; *R. L. Co. v. Brigham*, 1 App. Div. 490; *Mayor, etc., N. Y. & S. I. Ferry Co.*, 8 J. & S. 300.) The written direction of the surrogate sought to be enforced was a decree or final order within the meaning of the Code. (Code Civ. Pro. §§ 779, 2550, 2555, 2556, 2583, 2585, 2587, 2603, 2605.) The fact that the decree ordered the payment of costs to the petitioners or their attorneys, even were that direction irregular, could furnish no defense to the proceeding to enforce that decree. (*People ex rel. v. Bergen*, 53 N. Y. 404; *Ferguson v. Cummings*, 1 Dem. 423.) Under the present Code, Surrogates' Courts are given greater power to enforce their decrees by contempt proceedings than is vested in other courts of record. (Code Civ. Pro. §§ 14, 1241, 2481, 2555, 3347.) Since the enactment of the second part of the Code in 1880, the courts have uniformly recognized this power of surrogates to enforce a decree, including those directing the payment of costs, by contempt proceedings. (*In re Dissosway*, 91 N. Y. 235; *Gillies v. Krueder*, 1 Dem. 349; *In re Kurtzman*, 2 N. Y. S. R. 655; *In re Bartlett*, 3 Law Bull. 163; Redf. on Surr. 876; *In re Lippencott*, 5 Dem. 299.)

O'BRIEN, J. The only question involved in this appeal is the power of the Surrogate's Court to enforce a decree for the payment of costs by imprisonment. It appears that upon an application to remove the appellant, J. Lee Humfreville, from the office of executor and testamentary trustee under the will of Mary J. Havemeyer, deceased, the surrogate of New York, on the 5th day of May, 1896, entered a decree revoking the letters testamentary issued to the appellant, as executor and trustee, and removing him from office. The decree further directed that the appellant pay to the petitioners in the proceeding, or to their attorneys, the sum of \$625.72 costs.

This decree was duly served upon the appellant, but the costs were not paid. On the 30th of April, 1897, another order was entered in the Surrogate's Court, upon a hearing of all parties interested, adjudging the appellant to be guilty of contempt in disobeying the order referred to, which was cal-

culated to and actually did defeat, impair, impede and prejudice the rights and remedies of said petitioners, to their actual loss or damage, in the sum of \$625.72. It imposed a fine upon the appellant as a punishment for this contempt to the amount of the costs so awarded and directed that he be committed by the sheriff of the city and county of New York to the county jail of said county, to be there detained in close custody until he pay said sum, or be discharged according to law, and that a warrant issue to execute the order. Upon an appeal to the Appellate Division the order of the surrogate was affirmed, and it is this order which is now before us for review.

The decision of the question here involved requires the construction of two sections of the Code of Civil Procedure, which would appear, at first view, to be in conflict with each other. The various sections and provisions of the Code are to be read and construed as one complete act, and all of its provisions should be made to harmonize with each other as far as possible. By section 15 it is enacted that "a person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by state writ, except where an attorney, counselor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance." It cannot be denied that by this section imprisonment for the non-payment of costs is plainly and absolutely prohibited, except in the cases therein particularly specified; and it is not claimed that the case at bar comes within any of these exceptions, and obviously it does not. What is there forbidden in clear and comprehensive terms cannot be held to be permitted by some subsequent section or provision, unless such permission is expressed in language clear and certain. The general rule to be observed from the provisions of this section is that judgments or decrees for the payment of costs cannot be enforced by imprisonment.

But it is said that, notwithstanding the prohibition of this section against the enforcement of the payment of costs by

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imprisonment, the order appealed from is justified by the provisions of section 2555. That section provides that, in certain cases, the decree of the Surrogate's Court directing the *payment of money*, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or willfully neglects to obey it, by punishing him for a contempt of court. The cases in which this remedy may be pursued are specified in the section, and are: (1) Where the decree cannot be enforced by execution; (2) where part of it cannot be enforced by execution, in which case the part or parts which cannot be so enforced may be enforced as prescribed in this section; (3) where an execution has been issued to the sheriff of the surrogate's county and returned by him wholly or partly unsatisfied; (4) where the delinquent is an executor, administrator, guardian or testamentary trustee, and the decree relates to the fund or estate, in which case the decree may be enforced by proceedings for contempt, after the return of the execution, or without issuing an execution, in the discretion of the surrogate. Now, this section obviously does specify certain cases in which a surrogate's decree may be enforced by imprisonment; but it is important to observe that nothing in the section necessarily or specifically relates to a decree for the payment of costs, pure and simple. Section 2554 provides that a decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make payment. For the purpose of determining the effect of the different provisions of this Code, with respect to each other, they are to be deemed to have been enacted simultaneously. (Sec. 3355.) Treating the sections referred to as having been enacted on the same day and in the same bill, and reading them all together, the question here is, what is their legal effect and real meaning? Section 15 relates to costs, and to costs alone, and prohibits imprisonment for their collection. Section 2555 relates to decrees of Surrogates'

Courts directing the payment of money or the performance of any other act, and is not at all in conflict with section 15. The two provisions can have full force and effect and stand together. If the decree in the Surrogate's Court simply directs the payment of costs and nothing else, imprisonment cannot follow, under the provisions of section 15. There is nothing in section 2555 inconsistent with this. That section manifestly refers to decrees for the payment of money adjudged against a party other than mere costs. It authorizes imprisonment for the enforcement of such decree, and it may very well be that when, in such a decree for the payment of money, general costs are also included as an incident of the judgment, that then the whole decree may be enforced by proceedings for contempt. But that is not the case before us. The money which the appellant was directed by the order to pay was costs, and nothing else, and the collection of such costs cannot be enforced by imprisonment without violating the general prohibition of section 15. Since there is nothing in section 2555 specifically authorizing the enforcement of a judgment or decree for costs by imprisonment, and since imprisonment in such cases is absolutely forbidden by section 15, the two sections, when read together and construed together, relieve the appellant in this case from liability to imprisonment.

There is another view of the case that tends to strengthen this conclusion. There are numerous proceedings authorized by statute in the Surrogates' Courts touching the administration of estates of deceased persons, such as the removal of testamentary trustees, their accounting, and even the accounting of executors generally, as to which the Supreme Court has concurrent jurisdiction. It is not claimed that in any of these cases a decree for costs, when made in the Supreme Court, could be enforced by imprisonment. It is probably true that the proceeding in this very case for the removal of the appellant as testamentary trustee, could have been instituted in the Supreme Court, and, had it been instituted in that tribunal and the same costs awarded, it would not be

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claimed that the delinquent trustee, removed by the judgment, could have been subjected to imprisonment for the non-payment of the costs. So that, if the decision of the courts below is correct, a litigant in the Surrogate's Court may be imprisoned for costs, while if precisely the same litigation had been instituted in another court with concurrent jurisdiction, such a remedy would not follow. We do not think that the several sections of the Code to which reference has been made, when properly construed and understood, can possibly lead to such inconsistent and incongruous results. The general prohibition against imprisonment for costs contained in section 15, when read into the subsequent section, as it should be, prohibits such imprisonment in all cases where the successful party has recovered costs, simply without regard to the particular court in which the proceeding is instituted. This construction harmonizes the two sections and gives full scope and operation to each, and, at the same time, enforces what was obviously the general policy of the legislature, to prohibit imprisonment for costs, except in the cases specially reserved.

Without attempting to criticize any of the cases cited by the learned counsel for the respondent in support of the decree below, it is quite sufficient to say that none of them are controlling, and the most important ones can be easily reconciled with the result reached in this case.

For these reasons I think the order of the Appellate Division and that of the surrogate should be reversed, with costs to the appellant in all the courts.

All concur, except GRAY, J., who dissents on the ground that the court has committed itself to the other view in the *Dissosway Case* (91 N. Y. 235).

Orders reversed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE GROTON SAVINGS BANK, Appellant, v. EDWARD P. BARKER et al., Commissioners of Taxes and Assessments of the City of New York, Respondents.

1. TAX—SAVINGS BANKS—SURPLUS. When the surplus of a savings bank, under the statutes of its domicile, belongs in equity to, and is subject to distribution among, its depositors, it is to be deemed a liability as well as an asset, and comes within the principle that deposits in savings banks are debts that can be used to offset or extinguish assessments against the bank upon personal property.

2. FOREIGN SAVINGS BANK—TAX ON BANK SHARES. For the purposes of local taxation in this state of a savings bank of another state, upon stock of banks in this state held by it (L. 1882, ch. 409, § 812), the question whether its surplus belongs in equity to its depositors, so as to constitute a debt or liability available as an offset to the assessment, depends upon the statutory provisions of its own state.

3. CONNECTICUT SAVINGS BANK. When, under the statutes of its domicile regulating the operations of a savings bank and governing its obligations and duties (as, under the statutes of Connecticut governing the Groton Savings Bank), its surplus or profits from investments must, after reaching a certain amount and at certain times, be distributed to the depositors, such surplus belongs in equity to the depositors and is within the purview of the statute (L. 1857, ch. 456, § 4) exempting deposits in savings banks from taxation against the bank as personal property.

People ex rel. Groton Sav. Bank v. Barker, 19 App. Div. 64, reversed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 18, 1897, which reversed an order of Special Term vacating an assessment upon the stock of certain banks in the city of New York, held by the relator, for the purposes of taxation for the year 1894.

The facts, so far as material, are stated in the opinion.

Esek Cowen for appellant. The court below erred in reversing the order of the Special Term and affirming the assessment, because the money represented by these shares of stock was "due to depositors," and, therefore, exempt from

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Points of counsel.

taxation. (L. 1857, ch. 456.) The relator having made affidavit at the proper time that its debts were at least \$701,512.23, and had not been used to reduce its taxation on any other personal property, the commissioners should have struck the whole assessment from the roll, and the learned Appellate Division erred in affirming such assessment. (Gen. Laws, ch. 24, § 6a; U. S. R. S. §§ 5214, 5219; *People v. Weaver*, 100 U. S. 539; L. 1882, ch. 409, § 312.)

James M. Ward and *Francis M. Scott* for respondents. An exemption of property accorded to the appellant by the statutes of Connecticut would not avail to exempt such property in the state of New York. (*Catlin v. Trustees of Trinity College*, 113 N. Y. 142; *People ex rel. v. Coleman*, 135 N. Y. 231.) Savings banks are not wholly exempt from taxation under the laws of the state of New York. (L. 1857, ch. 456, § 4; L. 1892, ch. 202.) Even if a savings bank, as such, were not taxable, under the laws of this state, on its deposits and accumulations, it would still be liable to taxation as a stockholder in a national bank, without regard to the ownership of the shares. (*Bank of Redemption v. Boston*, 125 U. S. 60; *People ex rel. v. Coleman*, 135 N. Y. 231.) The original assessment against appellant was in strict accordance with law. (1 R. S. 387, § 51; U. S. R. S. § 312; L. 1882, ch. 409, §§ 312, 313; L. 1882, ch. 410, § 818; L. 1892, ch. 714.) The assessment and taxation of the appellant's bank stock was not made at a greater rate than that applied to other moneyed capital in the hands of individual citizens of this state. (U. S. R. S. § 5219; *Mercantile Bank v. New York*, 121 U. S. 138; *Palmer v. McMahon*, 133 U. S. 660; *W. N. Bank v. Parker*, 41 Fed. Rep. 402; L. 1882, ch. 409, §§ 312, 325, 326.) Under the construction placed by the courts upon the provision of the Revised Statutes of the state of Connecticut relating to the relations between the savings banks in that state and their depositors, it is quite plain that the relation of debtor and creditor does not exist, and that the appellant is not entitled to deduct from its gross assets as a liability the

amount of its deposits before the gross surplus is ascertained. (*Eaves v. P. S. Bank*, 27 Conn. 229; *Savings Bank of New London v. Town of New London*, 10 Conn. 111; *Coite v. Society of Savings*, 32 Conn. 173; *Green v. S. M. Co.*, 52 Conn. 330; *Price v. Society for Savings*, 64 Conn. 362.) The determination of the commissioners now under review in this proceeding is entirely within the lines indicated for their direction in assessing the shares of stock owned by a Connecticut savings bank in national banking associations in this city in the case of *People ex rel. v. Coleman* (135 N. Y. 231). (*People ex rel. v. Coleman*, 45 N. Y. S. R. 136.)

O'BRIEN, J. The defendants, as commissioners of taxes and assessments in the city of New York, in the year 1894, assessed the relator, a savings bank, incorporated and existing under the laws of the state of Connecticut, in the sum of \$43,000 as a part of its surplus invested in bank stocks in the city of New York. The court at Special Term reversed the action of the assessors and set aside the assessment as unauthorized. The controversy in that court seems to have turned upon the question whether the deposits in savings banks were debts, within the meaning of the statute, which can be offset against assessments for personal property. It was held that such deposits were debts, and that as they exceeded the assessment, the so-called surplus of the relator was not taxable. But upon an appeal by the defendants to the Appellate Division, the order of the Special Term was reversed and the assessment reinstated. The learned Appellate Division agreed with the Special Term that deposits in savings banks were debts that could be used to offset or extinguish assessments upon personal property; but that this principle did not apply to any surplus existing after all the liabilities and obligations of the bank had been deducted from the assets. It was supposed that the case of *People ex rel. Savings Bank of New London v. Coleman* (135 N. Y. 231) sustained this conclusion; and that case certainly does, if the facts in this case are the same. In that case Judge EARL said: "The exemption was

only to the extent of the deposits due to depositors. The surplus held by savings banks not being due to depositors, and, therefore, not taxable against them, was left where it was before, liable to taxation against the banks." The result in that case very evidently proceeded upon the assumption that the surplus of a savings institution is not in any sense an obligation due to the depositors. So far as appears, there was nothing in that case to show that the depositors had any interest whatever in the surplus, or that they could ever be entitled to any part of it. It was treated as a part of the property of the corporation itself, quite independent of any interest in the depositors. By the fourth section of chapter 456 of the Laws of 1857, "the deposits in any bank for savings which are due to depositors, and the accumulations in any life insurance company organized under the laws of this state, so far as the said accumulations are held for the exclusive benefit of the assured, shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of the state." Under this statute it was held in the case referred to, that the deposits in savings banks were exempt from taxation against the bank. The bank stock of the relator was undoubtedly subject to taxation, but the assessment was subject to be offset by the debts and liabilities which it owed to depositors; and the question here is whether the surplus of the relator was such a debt or obligation. It would seem that in the decision of the above case the court assumed that depositors in savings banks have no interest in the surplus, and, as before stated, there was nothing in the record to the contrary, and, indeed, the question was not raised in that case. The facts in this case, however, are quite different, since it appears by the legislative charter itself under which the relator exists as a corporation, that the income or profit which it derives from investments is to be divided among the persons making the deposits, their executors or administrators, and in just proportion, with such reasonable deduction as may be chargeable thereon. It also appears by

the general statute of Connecticut regulating the operations of savings banks, that the net income of any savings bank in excess of a sum equal to one-eighth of one per cent of its deposits actually earned during the six months last preceding, and no more, may be semi-annually divided among the depositors; but that no such dividend shall be made until the surplus shall have accumulated to an amount equal to three per cent of its deposits; that such accumulation shall be kept as a contingent fund to the extent of ten per cent of its deposits, and any surplus beyond that shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent of its deposits. It is apparent from these statutes that the profits of savings banks, under the laws which governed the obligations and duties of this relator, belong in equity to the depositors and are a part of the deposits in the same sense that the stipulated interest is, or may be. It is true that they are not payable at the same time, or in the same way, and that they may be held by the bank as a fund until they have reached the specified amount. This is for the purpose of security to the depositors against unforeseen contingencies. But in the end, under the general spirit and purpose of the statutes, the depositors, their personal representatives or assigns, would be entitled, in equity, to the pecuniary benefits of such accumulated profits. The so-called surplus is, therefore, within the equity of the statute exempting depositors of savings banks from taxation. This surplus fund is a debt, or obligation, due to depositors, just as much as the accumulated interest stipulated to be paid to them. There is no more reason, under these circumstances, for taxing the surplus fund of a savings bank than the accumulations of a life insurance company held for the exclusive benefit of the assured. The exemption in both cases is expressed in the same section of the statute, and in the same sentence; and in ascertaining the real condition of a savings bank for the purpose of such taxation as was made in this case, the surplus of the relator should not only have been included among its assets, but among its liabilities and obligations as well. The learned

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Appellate Division treated it as one of the relator's assets, but did not include it in its liabilities, and it was by this method of computation that the so-called surplus was made out. The court refused to treat it as an obligation due to depositors and available to the relator as an offset against the assessment upon its bank stock. It was assumed that the relator's surplus was not an obligation due or to become due, in any sense, to depositors, and this assumption was no doubt based upon the remark in the case above cited, but which was not involved in the case.

The obligations of the relator to its depositors must be ascertained from the provisions of the law of Connecticut, since it is under that law that it was organized, and that its contracts and obligations must be measured. We are not concerned with the question whether, under the laws of this state in regard to savings banks, such surplus is taxable or not. There are provisions in the statutes of this state which seem to indicate that surplus profits must, after reaching a certain amount and at certain times, be distributed to depositors. It is not, however, necessary in this case to consider the scope or meaning of these provisions. But we do not see how, under the language of the Connecticut statutes, the relator's surplus, as it is called, can be treated otherwise than as an obligation due to depositors, and, hence, as a part of the deposits, in ascertaining the liability of the relator to taxation upon the stock in question.

For these reasons we think that the order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs to the relator in all the courts.

All concur.

Order reversed.

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161	204

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE BRIDGEPORT SAVINGS BANK, Respondent, v. EDWARD P. BARKER et al., Commissioners of Taxes and Assessments of the City of New York, Appellants.

1. TAX ON BANK SHARES OWNED BY SAVINGS BANK—DEPOSITS AS OFFSET. A savings bank's deposits constitute a debt to its depositors and are to be deducted from its total assets, as a liability, in setting off its debts against the value of stock of banks in this state owned by it, for the purposes of local assessment and taxation on such stock, under the Banking Law (L. 1882, ch. 409, § 312).

2 FOREIGN SAVINGS BANK. A savings bank of another state, on being assessed for local taxation here upon stock of banks in this state owned by it, is entitled to all the deductions and exceptions allowed to a private citizen of this state in the assessment of his personal property.

3. UNITED STATES BONDS. In assessing a savings bank for local taxation upon stock of banks in this state owned by it, it is entitled to deduct from the apparent surplus, arrived at by deducting from its assets the amount due its depositors, the value of United States bonds in which such surplus is invested.

People ex rel. Bridgeport S. Bank v. Barker, 19 App. Div. 628, affirmed.

(Argued October 4, 1897; decided October 12, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 29, 1897, which affirmed an order of Special Term vacating an assessment upon shares of national and state banks in the city of New York belonging to the relator for the purposes of taxation for the year 1894.

The facts, so far as material, are stated in the opinion.

James M. Ward and *Francis M. Scott* for appellants. An exemption of property accorded to the respondent by the statutes of Connecticut would not avail to exempt such property in the state of New York. (*Catlin v. Trustees of Trinity College*, 113 N. Y. 142; *People ex rel. v. Coleman*, 135 N. Y. 231.) Savings banks are not wholly exempt from taxation under the laws of the state of New York. (L. 1857, ch. 456, § 4.) Even if a savings bank, as such, were not tax-

able, under the laws of this state, on its deposits and accumulations, it would still be liable to taxation as a stockholder in a national bank without regard to the ownership of the shares. (*Bank of Redemption v. Boston*, 125 U. S. 60; *People ex rel. v. Coleman*, 135 N. Y. 231.) The original assessment against respondent was in strict accordance with law. (1 R. S. 387, § 51; U. S. R. S. § 5219; L. 1882, ch. 409, §§ 312, 313; L. 1882, ch. 410, § 818; L. 1892, ch. 714.) The amount shown to be invested in United States bonds is not to be deducted from the gross surplus before ascertaining the net surplus as applicable to the assessment against the bank shares in national banking associations in New York city owned by the respondents. (L. 1892, ch. 714, § 202; 135 N. Y. 231.) The assessment and taxation of the respondent's bank stock was not made at a greater rate than that applied to other moneyed capital in the hands of individual citizens of this state. (U. S. R. S. § 5219; *Mercantile Bank v. New York*, 121 U. S. 138; *Palmer v. McMahon*, 133 U. S. 660; *W. N. Bank v. Parker*, 41 Fed. Rep. 402; L. 1882, ch. 409, §§ 312, 325, 326.) Under the construction placed by the courts upon the provision of the Revised Statutes of the state of Connecticut relating to the relations between the savings banks in that state and their depositors, it is quite plain that the relation of debtor and creditor does not exist, and that the respondent is not entitled to deduct from its gross assets as a liability the amount of its deposits before the gross surplus is ascertained. (*Eaves v. P. S. Bank*, 27 Conn. 229; *Savings Bank of New London v. Town of New London*, 10 Conn. 111; *Coite v. Society of Savings*, 32 Conn. 173; *Green v. S. M. Co.*, 52 Conn. 330; *Price v. Society for Savings*, 64 Conn. 362.) The assessment cannot be reduced below the sum of \$9,370.98 as the net surplus after making all deductions from the gross surplus including the sum of \$220,000, the actual value of its United States bonds, and all other deductions for property taxable elsewhere, and the value of the real estate owned by respondent. (*People ex rel. v. Coleman*, 135 N. Y. 231.)

Esek Cowen for respondent. Under section 5214 of the United States Revised Statutes, holders of national bank stock are to be taxed in the state where the bank is located on the same terms as capital is taxed in the hands of individual citizens of the state. A citizen of New York can offset his debts against an assessed valuation of his personal property. A foreign savings bank can do the same thing, and the amounts owing for deposits in such savings banks are debts due to its depositors. (*People v. M. & T. S. Inst.*, 92 N. Y. 7; L. 1875, ch. 371, § 38; *Eaves v. P. S. Bank*, 27 Conn. 232; *People ex rel. v. Coleman*, 135 N. Y. 235.) The assets of a foreign savings bank, invested in this state can, in any event, only be taxed to an amount equal to the surplus of the taxable property of the bank over its deposits. As the relator in this case has no such surplus, the assessment was properly vacated. (*People ex rel. v. Coleman*, 135 N. Y. 231.)

BARTLETT, J. The relator is a Connecticut corporation and was, in 1894, the owner of certain shares of stock of national and state banks doing business in the city of New York, the market value of which was \$49,934. The defendants assessed the relator upon the total amount of this stock. Application was duly made to the defendants to vacate this assessment, on the ground that the just debts of the relator exceeded the aggregate value of the shares. This application was refused.

The Special Term reviewed the assessment on certiorari and vacated it upon the ground that it was illegal, erroneous and void. This order was unanimously affirmed by the Appellate Division.

The learned counsel for the defendants discussed upon this appeal two propositions, viz.: First, that the relator is not entitled to have deducted from its total gross assets, as a liability, the amount of its deposits, upon the theory that it is a debt; second, that the relator is not entitled to have deducted from its apparent surplus, as an investment in property not taxable, \$220,000, representing the market value of the United States bonds held by it.

As to the first proposition, it has been decided by this court that the primary relation of a depositor in a savings bank to the corporation is that of creditor and not that of a beneficiary of a trust. (*People v. Merchants and Traders' Savings Institution*, 92 N. Y. 7.)

The bank is liable to pay the depositor the amount of his deposit as a debt. This being so, it follows that the amount is to be deducted from the gross assets as a liability.

As to the second proposition, we think the value of the United States bonds should be deducted from the apparent surplus.

The Banking Law of this state requires the shares of national and state banks to be assessed in the place where the bank is located whether the stockholder resides there or not, but he is to be accorded all deductions and exceptions allowed by law in assessing the value of other taxable personal property owned by the individual citizen of the state. (L. 1882, ch. 409, § 312.)

The individual citizen is allowed to deduct from the value of his personal property his debts and such stocks as are otherwise taxable, and such other property as is exempt by law from taxation.

In the case of the individual the amount invested in United States bonds would be deducted if held in good faith. It is urged in the case at bar by the commissioners that if the amount due depositors is deducted from the gross assets as a liability it must have included the United States bonds owned by the relator, as they were doubtless purchased with money received on deposit, and that to deduct the amount again would be to deduct \$220,000 of the deposits twice.

We do not think this reasoning is sound.

In ascertaining its apparent surplus the relator is entitled to deduct the amount due depositors as a liability, and from that apparent surplus are to be deducted all the allowances accorded the private citizen in the assessment of his personal property. If the relator elects in good faith to invest its apparent surplus in securities that are not taxable under the laws of this state

the assessing officer is bound by the statute to recognize its right to do so.

This rule of assessment has been repeatedly followed in this state. (*People ex rel. Savings Bank of New London v. Coleman*, 135 N. Y. 231.)

It is unnecessary to go over in detail the figures in this case which have led the court below to hold that, in the year 1894, the relator had no net surplus which was properly taxable.

The learned counsel for the relator, while not conceding that the figures of the appellants' brief are correct, insists that they show, when corrected, that the debts exceed the taxable assets as follows :

Gross assets.....	\$4,089,343 33
Deduct item of "profit and loss," improperly treated as an asset.....	34,322 79
True gross assets.....	\$4,055,020 54
Deduct liabilities.....	3,722,765 75
Apparent surplus	\$332,254 79
Deduct exemptions as stated by defendants' counsel, which includes U. S. bonds.....	357,206 60
Excess of liabilities.....	<u><u>\$24,951 81</u></u>

The counsel for defendants insists that the second item in the above statement, called "profit and loss," which was treated as a liability in the return to the writ of certiorari herein, is an asset. If this position is sound it would leave a net surplus of \$9,370.98.

We find nothing in the record which justifies the contention that this item of "profit and loss" is an asset, and an inspection of the original account contained in the return seems to indicate that it is a mere fiction of bookkeeping in balancing the books, and ought not to appear on either side of the account.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* FREDERICK ELDRED, JR., Respondent, *v.* JOHN PALMER, Secretary of State of the State of New York, Appellant.

1. NEW YORK AND KINGS COUNTIES—COUNTY OFFICERS—ELECTION AND TERM. The provision of the Constitution of 1894 (Art. 10, § 1), which took effect January 1, 1895, that county officers, including district attorneys, in the counties of New York and Kings, "shall be chosen by the electors once in every two or four years as the legislature shall direct," contemplated action by the legislature precedent to election and confers no authority upon the legislature as to an election consummated before legislation.

2. KINGS COUNTY—DISTRICT ATTORNEY—UNCONSTITUTIONALITY OF L. 1896, CH. 772. Chapter 772, Laws of 1896, providing that district attorneys of Kings county shall be elected once in every four years, was, in so far as it assumed to fix at four years the term of the incumbent who had been elected in November, 1895, invalid as an exercise of the power conferred by the Constitution upon the legislature to fix the term, and is, to that extent, unconstitutional and void.

3. TERM OF OFFICE, IN ABSENCE OF LEGISLATION. In the absence of legislation preceding their election, the terms of county officers in the counties of New York and Kings must, under the present Constitution (Art. 10, § 1; art. 12, § 3) be deemed to be two years, which, as to future cases, may be extended to four years if the legislature shall so prescribe.

4. TERM OF PRESENT INCUMBENT. In the absence of legislation preceding his election, the term of the present incumbent of the office of district attorney in Kings county, elected at the general election in November, 1895, is two years, and expires December 31, 1897; and a successor should be elected in November, 1897.

5. ELECTION OF 1899. That part of the act of 1896 (Ch. 772) which prescribes a term of four years for the office of district attorney of Kings county from and after December 31, 1899, is separable, and is a valid fixing of the terms of the officers to be elected in that and subsequent years.

6. ELECTION OF 1897. The term of the district attorney of Kings county, to be elected at the general election in November, 1897, will be two years, terminating December 31, 1899.

7. ELECTION IN 1897. The statutory and constitutional authority for holding an election for district attorney in Kings county in 1897 is ample. *People ex rel. Eldred v. Palmer*, 21 App. Div. 101, affirmed.

(Argued October 7, 1897; decided October 13, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

October 6, 1897, which reversed an order of Special Term denying relator's motion for a peremptory writ of mandamus.

The facts, so far as material, are stated in the opinion.

Joseph A. Burr, John M. Ward and Herman H. Baker for appellant. In the absence of any legislation of any sort relating to the office of district attorney in the county of Kings, subsequent to January 1, 1895, the term of office of Mr. Backus, who was elected in November, 1895, would not expire until the 31st day of December, 1899. Still more, there will be no expiration of the term of such office on the 31st day of December, 1897, and such office cannot be filled at the coming general election in November, 1897. (L. 1896, ch. 772.) The act of 1896 is a valid law. (*Rathbone v. Wirth*, 150 N. Y. 470; *Koch v. Mayor, etc.*, 152 N. Y. 72.) The act of 1896 was not in any sense an act extending the term of an incumbent then in office. (Throop on Public Officers, § 17; *People ex rel. v. Bull*, 46 N. Y. 61; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Crooks*, 53 N. Y. 648; Const. N. Y. art. 1, § 16; art. 10, § 1; *People ex rel. v. Comptroller*, 11 App. Div. 114; L. 1892, ch. 680, § 2.) Such construction of the Constitution and the statutes as we here contend for, can work no possible injury. The provision referred to in the Constitution was part of the general scheme of the Constitution to separate local from state and national elections, which was more clearly manifested in article 12, section 3, which only requires that local elections shall be held in an odd-numbered year, not in every odd-numbered year. (Throop on Public Officers, § 308.) Even if there should be an expiration of term in the office of the district attorney of Kings county on the 31st day of December, 1897, it cannot be filled at this election. (L. 1896, ch. 772.)

Nathaniel H. Clement and Isaac M. Kapper for respondent. It is the established policy of this state that legislation which extends the term of office of the elected incumbent thereof is

an attempt upon the part of the legislature to exercise the power of appointment, and is unconstitutional and void. (*People ex rel. v. Bull*, 46 N. Y. 57; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Crooks*, 53 N. Y. 648; *People ex rel. v. Foley*, 148 N. Y. 677; *Rathbone v. Wirth*, 150 N. Y. 459; *People ex rel. v. Randall*, 151 N. Y. 497.) In order to sustain this legislation we are compelled to assume that the district attorney of Kings county was elected for no definite term whatever. (Const. N. Y. art. 10, § 1; art. 12, § 3.) The Constitution read literally as well as with an eye to meaning, vests no power in the legislature to create or fix terms of office of constitutional officers after their election by the people. The words in the Constitution, "as the legislature shall direct," have ever been held a limitation or check upon legislative power to declare the duration of terms of office to a period of time anterior to the choice by the people. No authority has ever held these words to be a grant of power to the legislature to work a change in the term of office of a constitutional officer whom the people have already elected. (Const. N. Y. art. 10, §§ 1, 2; *People ex rel. v. Bull*, 46 N. Y. 57; *People ex rel. v. Comptroller*, 20 Wend. 595; *Bergen v. Powell*, 94 N. Y. 591; 30 Hun, 438.) In ascertaining the term of office for which a constitutional officer is elected under a provision of a Constitution or statute which leaves the length of the term in doubt, that construction will be followed which limits the term of the office to the shortest time. (Throop on Public Officers, § 308; *Wright v. Adams*, 45 Tex. 134.) The plain reading of article 10, section 1, of the Constitution is that the term of office of these county officers in New York and Kings counties is two years, until the legislature, in advance of an election, should make it four years. (*Rathbone v. Wirth*, 150 N. Y. 474; L. 1895, ch. 826; Story's Const. Law, §§ 587, 588-602; Paine on Elections, § 3; *People v. Keeler*, 17 N. Y. 370; *People ex rel. v. Bull*, 46 N. Y. 61; Cooley's Const. Lim. 87; Potter's Dwaris on Stat. 126, 143; *Oakley v. Aspinwall*, 3 N. Y. 547; *People ex rel. v. Albertson*, 55 N. Y. 55; *People*

ex rel. v. Draper, 15 N. Y. 544.) In the construction of statutes we find the general, and, in fact, unexceptional rule, in England and America to be, that no statute shall have a retroactive operation unless there be something in the very nature of the case, or in the language of the provision, which shows that it was intended to have a retroactive effect. (Potter's *Dwarris on Stat.* 74, 162; *O'Reilly v. Utah, N. & C. S. Co.*, 87 Hun, 412.)

ANDREWS, Ch. J. This proceeding was instituted to obtain an order requiring the secretary of state to include in his notices among the names of the officers to be voted for at the ensuing election for the county of Kings that of district attorney. The sole question relates to the duration of the term of the present incumbent of that office, who was elected at the general election held in November, 1895. It is claimed in behalf of the relator that the election of the present incumbent was for the term of two years from January 1, 1896, and that his term expires December 31, 1897. It is insisted, however, in behalf of the defendant, that by force of chapter 772 of the Laws of 1896, passed after the election of the present incumbent, his term of office was fixed at four years from the time of his election, which does not expire until December 31, 1899. The constitutionality of that statute is challenged, and it has been held by the Appellate Division for the second department that the statute is unconstitutional in so far as it continued the present incumbent in office for the term mentioned. Prior to the first day of January, 1895, the provision of the Constitution which regulated the election and term of district attorneys was as follows: "Sheriffs, clerks of counties, including the register and clerk of the City and County of New York, coroners and district attorneys, shall be chosen, by the electors of the respective counties, once in every three years and as often as vacancies shall happen." (Const. of 1846, art. X, sec. 1.) The predecessor of the present incumbent of the office was duly elected in 1892 for three years under the Constitution of 1846, and his term expired December 31,

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1895, and the present incumbent, as stated, was elected as his successor. When he was elected the term of district attorney of Kings county had been changed by art. X, sec. 1, of the new Constitution, which took effect January 1, 1895, which declared: "Sheriffs, clerks of counties, district attorneys, and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once in every two or four years as the legislature shall direct." The object of this provision prescribing that the terms of the county officers mentioned in the counties of New York and Kings, should be two or four years, was to bring the time of electing these officers into harmony with the new constitutional provision contained in art. XII, sec. 3, requiring that the election of city officers, except in cities of the third class and of county officers elected in the counties of New York and Kings, "shall be held on the Tuesday succeeding the first Monday in November in an odd numbered year, and the term of every such officer shall expire at the end of an odd numbered year." It is manifest that to carry out the purpose, that county officers in the counties of New York and Kings should be elected in odd numbered years, it was essential to change the term from an odd to an even number, as a continuous three-year term would necessarily make every alternate term expire in an even numbered year. For this reason it was declared in art X, sec. 1, that "such officers shall be chosen by the electors once in every two or four years as the legislature shall direct." This provision doubtless contemplated that the legislature would act and fix the term of the district attorney and the other county officers in the counties of New York and Kings at the one or the other of these periods. The whole legislative session of 1895, however, was allowed to pass without any statutory enactment fixing the term of the district attorney or any other of the

county officers in Kings county, so that when the present incumbent of the office of district attorney of Kings county was elected in the fall of 1895, there was no legislative enactment in force prescribing the duration of the term. The former term of three years had been abrogated by force of the new constitutional provision, and the legislature had omitted to prescribe any other term. The incumbent was not elected for three years for the reason stated. There was no statute defining the duration of his term, and if nothing subsequently had occurred, the election was either wholly invalid, because no term had been prescribed, or he was elected for an indefinite term, or for a term of two or four years, if by a reasonable construction of the Constitution it could be held that in the absence of legislation the duration of the term was fixed by the Constitution at one of the two periods. But on the 20th day of May, 1896, after the present incumbent had entered upon his office, the legislature enacted chapter 772 of the laws of that year as follows: "The present district attorney of the county of Kings shall continue in said office until the 31st day of December, 1899, and his successor shall be chosen at the annual election to be held next preceding the said 31st day of December, 1899, for the term of four years, and thereafter district attorneys of the county of Kings shall be chosen by the electors of said county once in every four years." If this was a valid exercise of legislative power, then the term of the present incumbent will continue until the 31st day of December, 1899, and no election of a successor can be held until November of that year.

We concur with the Appellate Division that the act, so far as it undertakes to continue the present incumbent in office until December 31, 1899, is unconstitutional and void, and without elaboration we shall state our reasons for this conclusion. The words of the Constitution are that the district attorney and other officers mentioned in art. X, sec. 1, to be elected in Kings county, "shall be chosen by the electors once in every two or four years as the legislature shall direct." The clear

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import of the language is that the direction of the legislature fixing the term shall precede the choice to be made. The officers are to be "chosen" by the electors for one of two periods, not for an indefinite period to be subsequently defined by the legislature. It would be contrary to all precedent that the electors should not be advised before casting their votes of the duration of the term of the officers to be elected. The power attempted to be exercised by the legislature in this case, if sustained, would open the door to obvious abuses. It would practically confer upon the legislature the power to prescribe a short or long term, and to shorten or lengthen the official life of an officer, who by the Constitution is to be elected by the people, upon considerations wholly foreign to their true interests. The court, in *People ex rel. Fowler v. Bull* (46 N. Y. 57), had occasion to consider an act of the legislature extending the term of an elected officer, and Judge FOLGER's opinion in that case presents with great force the public considerations which require the condemnation of such legislation. It was regarded as subversive of the principles of the elective system and contrary to the true interpretation of the Constitution. The act of 1896 is in effect an attempt on the part of the legislature to appoint to office, and by its fiat, without the concurrence of the electors, to protect the present incumbent in the possession of an office for a term for which he never has been elected, unless, indeed, the wholly inadmissible claim of the appellant can be maintained, that the electors voted for the present district attorney for a term, to be thereafter fixed by the legislature, of two or four years. This contention ignores the plain meaning of the constitutional provision, and also one of the canons of construction applicable as well to Constitutions as to statutes, that provisions prescribing power or giving authority are to be construed, in the absence of a clear intention to the contrary, as conferring power or authority to be exercised in respect to the future, and not as to transactions already consummated.

Having reached the conclusion that the act of 1896, so far as it assumed to fix the term of the present incumbent

of the office, was invalid as an exercise of the power conferred by the Constitution upon the legislature to fix the term of office of the district attorney, it remains to consider whether, in the absence of legislation, the Constitution itself fixed the term of the present incumbent. We are of opinion that, until the legislature acted, the terms of county officers elected in the counties of New York and Kings must be deemed to be two years, which, as to future cases, may be extended to four years if the legislature shall so prescribe. The legislature had the option to prescribe either one or the other of the two periods. But not having exercised it, the minimum period should be taken as the duration of the term. This construction gives effect to the constitutional provision requiring elections for municipal officers and county officers in New York and Kings counties to be held in an odd numbered year. It fixes the term at the only period which with certainty was included within the intention of the electors, and prevents any hiatus in the incumbency of county offices. It enforces the public policy that the term of office of an elected officer shall be fixed before the election. It renders fixed and stable the terms of office and prevents an exercise of legislative power in legislating an incumbent in or out of office upon partisan considerations. It leaves to the legislature the unrestricted right to prescribe for the future the duration of the term at the minimum or maximum period. While the construction we adopt is not free from doubt, it is most consistent with the principles of the elective system and the uniform policy upon which the courts have acted in dealing with analogous conditions. It is to be observed that sheriffs, county clerks and registers are in the same category with district attorneys in art. X, sec. 1, of the Constitution. If the act of 1896 was a valid exercise of legislative power, then the sheriff and register of Kings county to be elected this fall may have a two or four years term as the legislature may hereafter prescribe, for up to this time no legislation has been enacted prescribing the duration of their terms. Every consideration of public policy

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Statement of case.

demands that no such demoralizing condition of the public service should be permitted and we are satisfied that the Constitution does not require it.

That part of the act of 1896 which prescribes a term of four years for the office of district attorney, from and after December 31, 1899, is separable from the other provisions and is, we think, a valid fixing of the terms of this officer to be elected in that and subsequent years. The term of the officer to be elected this year will be two years, terminating December 31st, 1899. The statutory and constitutional authority for holding an election for district attorney in Kings county the present year is ample. The statute prescribes that a general election shall be held in November of each year. The Constitution, art. XII, sec. 3, prescribes that elections for the offices mentioned therein "shall be held on the Tuesday succeeding the first Monday of November in an odd numbered year." Whatever officers are to be elected may be voted for at the ensuing election.

We concur in most of the views and in the conclusions in the opinion below, and the order appealed from should, therefore, be affirmed.

All concur.

Order affirmed.

BUFFALO LOAN, TRUST AND SAFE DEPOSIT COMPANY, as Administrator with the Will Annexed of DOROTHEA LEONARD, Deceased, Respondent, v. JOHN LEONARD, Appellant, Impleaded with BUFFALO LOAN, TRUST AND SAFE DEPOSIT COMPANY, as Guardian, etc.

1. GUARDIAN AND WARD — RESIDUARY AND SPECIFIC LEGATEES — ACTION — PARTIES. When, in an action brought by an administrator with the will annexed to recover from the residuary legatee moneys prematurely paid to him by a former executor, the plaintiff is made a party defendant in the capacity of guardian of the estate of an infant specific legatee, whose unpaid legacy constitutes the only claim against the testator's estate, the action is in effect the same as though the demand was at the suit of the infant, through his guardian, against the residuary legatee.

2. GUARDIAN'S NEGLIGENCE. *It seems*, that in an action in which an infant, through his guardian, seeks to recover the amount of a legacy

from the residuary legatee, to whom the executor had prematurely paid over funds of the estate, the infant cannot be deprived of his remedy by the neglect of the guardian to reduce the legacy to possession when he might have done so.

3. PASSIVITY OF GUARDIAN NOT A DEFENSE TO RESIDUARY LEGATEE. The fact that a guardian remained passive for four years, without instituting proceedings to compel an executor to account and pay over a legacy of the ward's, when the estate was known to be amply sufficient for the payments required by the will and the executor was believed to be solvent, does not constitute a defense to the residuary legatee in an action to compel him to refund to the ward moneys prematurely received from the executor.

4. RESIDUARY AND SPECIFIC LEGATEES—LIABILITY FOR PREMATURE PAYMENT BY EXECUTOR. If a residuary legatee receives moneys of the estate from the executor without any warrant in law or any judicial settlement of accounts, he takes with all the risks attending such a premature payment; and, on the subsequent insolvency of, and devastavit by, the executor, can be compelled to refund, by the legatee of a specific money legacy which had not been paid or provided for by the executor.

5. LIABILITY OF RESIDUARY LEGATEE. If a residuary legatee, in the absence of a judicial settlement of the accounts of the executor, receives from the executor a voluntary payment of moneys of the estate, when, as matter of fact, a legacy has not been paid or provided for, he subjects himself to the same liability to refund as would exist if he were shown to have received the money with knowledge that the legacy had not been paid or provided for.

Buffalo Loan & Trust Co. v. Leonard, 9 App. Div. 884, affirmed.

(Argued October 8, 1897; decided October 19, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 27, 1896, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

George W. Cothran for appellant. The guardian having assented to the funds remaining in the hands of the executor, without security, and receiving payments of interest thereon, assumed the responsibility of making good to its wards the sums of money that were lost by reason of the devastavit of the executor, as it was solely by reason of the culpable negli-

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gence of the guardian, and in violation of its duty to reduce the estate of its wards to possession, that the loss occurred. (2 R. S. 150-153, §§ 3, 20, 21; *King v. Talbot*, 40 N. Y. 76; *Chapman v. Tibbits*, 33 N. Y. 289; *White v. Parker*, 8 Barb. 48; *Schultz v. Pulver*, 11 Wend. 363; *Harrington v. Keteltas*, 92 N. Y. 40; *O'Conner v. Gifford*, 117 N. Y. 275; *In re Hall*, 16 Misc. Rep. 174.)

Wallace Thayer for respondent. The administrator empowered by the law to represent the estate does not take the burden of the malfeasance or misfeasance of the preceding executor, appointed by the same law, to care for that estate, who has been false to his trust. It is only successors in interest who are thus bound by the acts of their predecessors in interest; not successors in trusteeships; there is no such privity between them. (*Harrington v. Keteltas*, 92 N. Y. 40.) The negligence of the guardian, if there were any, would not affect whatever rights the infants may have. (*Gilbert v. Taylor*, 76 Hun, 92; 148 N. Y. 298; *Mills v. Smith*, 141 N. Y. 256; *Collin v. Wilcox*, 47 N. Y. S. R. 917; 13 Am. & Eng. Ency. of Law, 132.)

GRAY, J. The plaintiff, as administrator with the will annexed of the estate of Dorothea Leonard, deceased, brought this action to recover of the defendant, John Leonard, moneys which had been prematurely paid to him, as residuary legatee, by a former executor of the estate.

By Mrs. Leonard's will she gave certain pecuniary legacies, among others, to Margaret and Herman Ruf. The remainder of her estate she gave to her husband, John Leonard, the defendant. The will was admitted to probate in May, 1890, and Louis K. Purviance was appointed sole executor. At that time, Margaret and Herman Ruf were infants and this plaintiff was appointed the guardian of their estate. The executor received into his possession moneys to an amount more than sufficient to pay the specific legacies and to leave a surplus greater than was in fact received by the defendant Leonard. But when, in November, 1894, by a decree of the Erie

County Surrogate's Court, in proceedings instituted by Leonard to compel Purviance, as executor, to account for and to pay over the moneys received by him, he was required to pay to the guardian of said infants the sum of \$3,606, in full for their legacies, he was discovered to be insolvent and he absconded. Prior to that time, however, he had paid to the defendant Leonard, as residuary legatee, the sum of over \$5,000; but this was done without the authority or decree of any court.

It was found below that Purviance was financially responsible from the time of his appointment up to about the time when the surrogate's decree was obtained against him. After Purviance had made default and had absconded, his letters were revoked and this plaintiff was appointed administrator with the will annexed. It thereupon commenced this action against the defendant Leonard alone; but, subsequently, the guardian of the infant legatees was brought in as a party defendant. Thus the trust company is both plaintiff, as administrator, and a defendant, as the infants' guardian. This procedure was deemed advisable, in order that the questions raised by Leonard in his defense might be more effectually disposed of. That defense was that the legacies sought to be recovered in this action were lost, solely, by the carelessness, negligence and inattention to duty of the guardian of the infants; in not taking proper steps to reduce their estates to possession and to see that they were properly invested. It is Leonard's claim that the loss should fall upon the guardian and not upon the residuary legatee.

The action, in the aspect which it assumed, upon the bringing in of the infants' guardian as a party defendant, was the same, (there being no claims against the estate except those of the infants), as though the demand was at the suit of the infants, through their guardian, against the residuary legatee. It is not disputed that, as between such a legatee and the residuary legatee, the former is entitled to receive his legacy in full before the latter is entitled to anything; but it is argued that the conduct of this guardian was such, with

respect to the estate, as to render it legally responsible to its wards for the moneys due by the executor and that, as between it and the residuary legatee, the loss, occurring through the executor's misconduct, should fall upon the former. If the facts justified this charge of neglect as to the guardian's conduct, I should, still, be unwilling to hold that, in consequence thereof, the infants had become deprived of their remedy of pursuing the moneys of the estate thus prematurely paid into the hands of the residuary legatee. It is they who, in effect, are suing through their guardian and the issue would have to be disposed of according to their rights, and without regard to failures or omissions on the part of their guardian. The guardian could not impair or destroy the vested rights of its wards. But the facts only justify the inference that, during the years which intervened between the executor's appointment and the time when he was called to account in the Surrogate's Court, the guardian had remained passive. The estate was known to be amply sufficient for the payments required by the will; it was in the hands of the person selected by the testatrix to execute her testamentary intentions, and he was known, or believed, to be solvent. While the guardian would have had the right to institute proceedings for an accounting, and to compel the payment to it of the infants' legacies, the neglect to do so cannot be said to have been culpable in degree. Nor does it lie in the mouth of the residuary legatee to set up any such claim. He knew that nothing specific was given to him, but only that which remained of the estate after the debts and legacies had been paid. It behooved him, more especially, to have the estate settled up and the residue judicially ascertained. If he chose to demand and receive moneys from the executor, without any warrant in the law, or any judicial settlement of his accounts, he took them with all the risks attending such a premature payment. Where the question arises between general or specific legatees, and the endeavor is to compel a refunding on the part of one who has been paid his legacy, its solution depends upon considerations

which are not applicable to a case where the funds are pursued into the hands of a residuary legatee. If a legatee has been successful in getting his legacy paid to him, and the estate in the executor's hands was sufficient to pay all legacies at the time, a subsequent devastavit by the executor, through which there occurs a deficiency of assets wherewith to pay the other legatees, will not justify an action to compel a refunding by the legatee who has received his legacy. That would be because the payment itself to the legatee was not a devastavit and because the law would throw its protection around the more diligent legatee. (Roper on Legacies, *460; *Lupton v. Lupton*, 2 John. Ch. 626, 627.) Such a right to compel a refunding would only exist in a case where the assets were not sufficient to pay all the legacies at the time of the payment to the particular legatee. Where the case is between a general legatee and the residuary legatee, I can imagine of no defense to the latter's liability to refund in case of a premature payment of moneys, where the former is without fault in the matter, and I certainly know of no rule which would impute to an infant legatee the fault of his guardian. The residuary legatee is entitled to nothing, until all the debts and other legacies are paid. Of course, there might be a case, where he had been paid by the executor in good faith and when apparently entitled to the payment, and then no subsequent insolvency of the executor, resulting in the loss of a fund set apart and held for a legatee, would create a liability to refund. Such a case was *Walcott v. Hall*, (2 Brown, Ch. 305), where the executor had set apart, under the testamentary provision, a legacy given to an infant, payable when he became of age, and had then paid the surplus of the testator's estate to the residuary legatees. He became insolvent, before paying over the legacy, and it was held that the residuary legatees would not be compelled to refund; for they had only received what they were entitled to. So in *Mills v. Smith* (141 N. Y. 256), where a sum of money was given in trust to the executors to apply the income for the use of the testator's son during

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Statement of case.

his life, with the direction upon his death to pay over to his children, and upon the death of the beneficiary the executor was insolvent and unable to pay over the fund, it was sought, upon various grounds, to recover from the residuary legatees under the will. We held that the responsibility for the subsequent default of the executors, as trustees for the plaintiff's father, could not be fastened upon the residuary legatees. It was observed in that case, with respect to residuary legatees, that, "they are liable to refund in a case where, having been paid from the estate, it is discovered that there is a deficiency of assets for distribution under the will, caused by the diminution of the estate through the premature payment of legacies."

In the present case, for the defendant Leonard, in the absence of a judicial settlement of the accounts of the executor, to have received a voluntary payment of moneys, was to subject himself to the same liability to refund, as would exist if it was shown that he received the money with knowledge that the other legacies had not been paid, or provided for. (*Stephenson v. Axson*, 1 Bailey Eq. [S. C.] 274.)

I think the judgment appealed from was right and that it should be affirmed, with costs.

All concur.

Judgment affirmed.

MARY E. BUCHANAN, Appellant, v. SARAH J. LITTLE et al.,
Respondents.

154	147
s 155	635

154	147
f 165	69

WILL — TRUST FOR TWO LIVES — CONTINUING ANNUITIES CHARGED UPON ESTATE. The will of a testator who left his wife, a sister, two daughters, and grandchildren surviving, gave the entire estate, real and personal, remaining after payment of debts, to his executors in trust to pay his wife \$500 a year during life in lieu of dower; to pay his sister \$400 a year during life, and to pay the remainder of the income to his two daughters, one-half to each, during life. The will provided that if either daughter died during the life of the other, without leaving issue, the survivor should take her deceased sister's share; that if either died during the life of the other leaving issue, the issue should take; and that at the death of the two daughters, the trust property should go to their children absolutely, one half to the children of each, *per stirpes*. Held, that there was created a valid trust dependent, as to its duration, upon the lives of

the two daughters; that the annuities to the wife and sister were a charge upon the residuary estate, whether held in trust or freed therefrom by the falling in of the selected lives; and that, at the termination of the trust, the present value of the annuities should be ascertained and the amount paid over to the annuitants, and the remainder of the estate distributed to the remaindermen, discharged of any lien.

Buchanan v. Little, 6 App. Div. 527, modified.

(Argued October 8, 1897; decided October 19, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 2, 1896, which affirmed a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on trial at Special Term.

This action is brought in form to partition real estate situated in the city of New York, of which William H. Cooper died seized, and involves the construction and interpretation of his will.

The testator left a widow, two children and five grandchildren.

The following are the material portions of the will: "*Second*. I give, devise and bequeath all the remainder of my estate, both real and personal, to my executors hereinafter named, and the survivor of them, in trust, however, for the uses and purposes hereinafter set forth," etc.

"1st. I direct my said executors to pay to my beloved wife, Jane Cooper, the sum of five hundred dollars per year, each and every year during her natural life, to be paid half-yearly or quarterly if practicable, which said sum is hereby given her in lieu of dower.

"2nd. I direct my said executors to pay to my sister, Rebecca Cooper, the yearly sum of four hundred dollars, each and every year during her natural life, payable quarterly.

"3rd. I direct my said executors to pay all the remainder of the income of my estate, after paying the above-mentioned legacies to my wife and sister as follows: One-half of the remainder of the income of my said estate to my daughter Sarah Jane Little (formerly Cooper) for and during her natural life, and the other half of the remainder of my said income to

my daughter Mary E. Cooper, for and during her natural life, said income to be paid half-yearly or quarterly, if practicable.

"4th. Should either of my said daughters die without lawful issue, during the life of the other, I give the share of the deceased sister in my estate to the survivor.

"5th. Should either die during the life of the other, leaving lawful issue, I direct the share of such deceased sister to be paid to her children, share and share alike.

"6th. At the death of my two daughters, Sarah Jane Little and Mary E. Cooper, I give, devise and bequeath all my property, both real and personal, to their children, one-half to the children of each daughter, share and share alike, *per stirpes* and not *per capita*. Should either of my said daughters die without leaving lawful issue, then I give all my estate to the children of the other, share and share alike. Should both of my said daughters die without leaving lawful issue my estate shall then go to my heirs at law."

George S. Hamlin for appellant. The will created a trust estate in the executors, which suspended the power of alienation during its existence. (1 R. S. 729, §§ 55, 60; *Tobias v. Ketchum*, 32 N. Y. 330; *Leggett v. Perkins*, 2 N. Y. 305; *Brewster v. Striker*, 2 N. Y. 36; *Vernon v. Vernon*, 53 N. Y. 359; *Morse v. Morse*, 85 N. Y. 59; *Cochrane v. Schell*, 140 N. Y. 516; *Boynton v. Hoyt*, 1 Den. 57; *Amory v. Lord*, 9 N. Y. 403; *Harris v. Clark*, 7 N. Y. 259.) It was entirely competent for the testator to make the disposition imputed to him by the Appellate Division of the Supreme Court. (*Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 466; *Schermerhorn v. Cotting*, 131 N. Y. 48.) The purposes of the trust render its continuance imperative, not only for the lives of the two daughters of the testator, but for the lives of his wife and sister. (*Nicoll v. Walworth*, 4 Den. 385; *Bennett v. Garlock*, 79 N. Y. 317; *Crooke v. County of Kings*, 97 N. Y. 446; 1 Perry on Trusts, § 315; *Haynes v. Sherman*, 117 N. Y. 437.) The provision of the sixth subdivision of the will, which gives all of the tes-

tator's property, upon the death of his two daughters, to their children, is in no way inconsistent with, or repugnant to, the continuance of the trust. (*Einbury v. Sheldon*, 68 N. Y. 235; *Stevenson v. Lesley*, 70 N. Y. 516; *Manice v. Manice*, 43 N. Y. 380; *Crooke v. County of Kings*, 97 N. Y. 447.) The foregoing construction is in accordance with established rules, of which that adopted by the Appellate Division is in violation. (*Crooke v. County of Kings*, 97 N. Y. 434; *Colton v. Fox*, 67 N. Y. 348.) The rule cannot be invoked in this case, that the construction will be adopted which sustains rather than that which destroys the trust. (*Hawley v. James*, 16 Wend. 144; *Colton v. Fox*, 67 N. Y. 351.) The power of sale in the executors does not relieve the trust from the objection that it unduly suspends the power of alienation. (*Brewer v. Brewer*, 11 Hun, 147; 72 N. Y. 603; *Hobson v. Hale*, 95 N. Y. 609; *Haynes v. Sherman*, 117 N. Y. 437.) The will cannot be sustained in part and avoided in part. (*Knox v. Jones*, 47 N. Y. 390; *Benedict v. Webb*, 98 N. Y. 466; *Savage v. Burnham*, 17 N. Y. 562; *Van Schuyver v. Mulford*, 59 N. Y. 432.)

N. Cothren for Sarah J. Little et al., respondents. In case of doubt that construction should be adopted which will sustain the will. (*Greene v. Greene*, 125 N. Y. 506.) If the principal disposition of a will can be upheld, ulterior, contingent limitations which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded. (*Henderson v. Henderson*, 113 N. Y. 1; *Tiers v. Tiers*, 98 N. Y. 568; *Harrison v. Harrison*, 36 N. Y. 543; *De Kay v. Irving*, 5 Den. 646; *Everitt v. Everitt*, 29 N. Y. 39; *Downing v. Marshall*, 23 N. Y. 366; Chaplin on Susp. of Power of Alienation, §4; *Becker v. Becker*, 13 App. Div. 342.)

B. Aymar Sands and *C. P. Northrop* for Samuel F. Jayne et al., executors, respondents. The will created a good and valid trust under the provisions of the Statutes of Uses and Trusts authorizing the creation of an express trust. (1 R. S.

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678, § 55, subd. 3.) The disposition of the income during the period of a trust estate in no way determines the question of the validity of the trust. (*Schermerhorn v. Cotting*, 131 N. Y. 48; *Cochrane v. Schell*, 140 N. Y. 516.)

BARTLETT, J. The single question considered and decided by the learned Appellate Division is, does this will create a trust measured by two lives in being at the time of the death of the testator, or is it dependent upon four lives, as insisted by the appellant? The validity of the trust was upheld, and we should affirm the judgment on the opinion below, were it not for the fact that a very important feature of this case was not fully considered.

The scheme of this will is exceedingly simple. The testator, after directing the payment of his debts, gives his entire estate, real and personal, to his executors to carry out the following trust: To pay his wife \$500 a year during life in lieu of dower; to pay his sister Rebecca Cooper \$400 a year during life; to pay the remainder of the income, one-half to his daughter Sarah Jane Little, and the other half to his daughter Mary E. Cooper during their lives.

If either of the daughters died without leaving lawful issue during the life of the other, the survivor took the deceased sister's share. If either died during the life of the other, leaving lawful issue, the issue took. At the death of the two daughters named he gives the trust property absolutely to their children, one-half to the children of each, *per stirpes*, and not *per capita*.

There are other provisions as to the remainder not material to the question now before us.

The duration of the trust is clearly dependent upon the lives of the two daughters, and there is no other suggestion on the face of the will. We, therefore, agree with the court below, that the testator created a valid trust.

The principal argument urged against this construction of the will by the appellant was, that the lives of the daughters might fall in, thus terminating the trust long before the death

of either the wife or the sister, who are entitled to annuities during their natural lives, and that it was quite impossible that the testator should have contemplated that there might be a very considerable time when his wife and sister would be cut off from any income under the will.

The opinion below intimates that the testator selected the lives of his children, who, in the ordinary course of events, would be presumed to live longer than the annuitants, and if this expectation was not realized, it was one of the risks that the testator assumed when he created such a trust.

We are of the opinion that the termination of the trust while the annuitants, or either of them, survived would not result in cutting off the annuities. It is clearly the intention of the testator, on the face of the will, that the annuities during the lives of his wife and sister, respectively, should be a charge upon his residuary estate, whether held by the executors in trust or freed from that limitation by the falling in of the selected lives.

This lien upon the estate, consisting of real and personal property, could not be effectually enforced by the annuitants if the estate were distributed to the remaindermen under the provisions of the will, especially if there should be a failure of grandchildren and the residue passed to the heirs at law and next of kin.

It would, therefore, be necessary to ascertain the present value of the annuities at the termination of the trust and pay the amount over to each annuitant respectively, and distribute the residue of the estate to the remaindermen, discharged of any lien. In this manner the entire will of the testator is carried out, and those who stood quite as near to him as the life tenants and remaindermen are protected from a result that never could have been contemplated when the will was framed.

The judgment appealed from must be modified so as to conform to these views, and as so modified affirmed, with costs to all the parties to be paid out of the estate.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
EDWARD HUGHSON, Appellant.

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157	598
154	158
f168	15

1. **MURDER — EVIDENCE.** The evidence on a trial for wife murder by shooting *held* to indicate deliberation and premeditation and to support the verdict of guilty.

2. **JURY — CHALLENGE FOR BIAS.** The fact that a juror, on examination for service on the trial of an indictment for murder by shooting, states that he has a prejudice against a person in possession of a pistol without a permit, but that such prejudice will not influence his verdict, does not disqualify him so as to sustain a challenge for bias.

3. **DEFENSE OF MENTAL IRRESPONSIBILITY — EVIDENCE — DENIAL OF ACT.** If on a trial for murder the defendant in effect admits the act, but interposes the defense that it was done when he was unconscious and not criminally responsible, declarations made in his presence immediately after the act charging him with it and denied by him are admissible against him for the purpose of characterizing his denial, as tending to show that he denied the commission of the act which he knew he had committed.

4. **CHARGE TO JURY — DEFINITIONS OF MURDER IN FIRST DEGREE.** Reversible error is not predicable upon the fact that the trial judge in defining murder in the first degree included the statutory provisions as to the killing of a person by an act imminently dangerous to others or committed while engaged in a felony (Penal Code, § 183), though not applicable to the case, where, although he did not in specific terms withdraw such acts from the consideration of the jury, he limited their consideration to the killing with deliberation and premeditation.

5. **GOOD CHARACTER.** Good character creates a doubt against positive evidence of guilt only when, in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence.

6. **LEAVING EXHIBITS WITH JURY — CLOTHING.** When clothing of the deceased has been made an exhibit upon a trial for murder, and at the retirement of the jury the court inquires if there is any objection to the jury taking the "exhibits," the clothing is to be deemed included in the inquiry, as well as the papers and other articles in the case, so as to call for an objection from the defendant if he does not wish the clothing to be left with the jury. (Code Cr. Pro. § 425.)

(Argued October 5, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Supreme Court, Albany county, entered October 27, 1896, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

P. C. Dugan for appellant. The trial court erred in overruling the defendant's challenge for bias to the juror Jacob Miller, who participated in the verdict. (*People v. Larubia*, 69 Hun, 197; 140 N. Y. 87; *Greenfield v. People*, 74 N. Y. 278-283; *People v. Casey*, 96 N. Y. 118; *People v. McQuade*, 110 N. Y. 284; *Balbo v. People*, 80 N. Y. 495.) Section 528 of the Code of Criminal Procedure requires this court to review the facts in a capital case, and to grant a new trial when justice requires it, whether any exception shall have been taken or not in the trial court. (*People v. Shea*, 147 N. Y. 85; *People v. Pallister*, 138 N. Y. 601; *People v. Barberi*, 149 N. Y. 271.) It was error to permit the witness Delia McTeague to describe her call at the defendant's house nearly a year before the alleged homicide. (*People v. Sharp*, 107 N. Y. 427; *Commonwealth v. Abbott*, 130 Mass. 472; *People v. Corey*, 148 N. Y. 476; *People v. McKeon*, 10 N. Y. Cr. Rep. 205; *People v. Larubia*, 140 N. Y. 92.) It was error to permit the witness Pauline Goutchy to testify as to the appearance of Mrs. Hughson when she first saw her on the morning of June twenty-third, and particularly in reference to the blood, and what Mrs. Hughson told her. (*Walsh v. People*, 88 N. Y. 463.) It was clearly erroneous to permit the witness Benjamin to detail the conversation between himself and the witness Murphy. (*People v. Larubia*, 140 N. Y. 93.) The trial court should have directed a verdict of acquittal of the crime of murder in the first degree, as requested by the defendant at the close of the People's case. (*Stokes v. People*, 53 N. Y. 179; *People v. Downs*, 123 N. Y. 564.) The whole evidence in the case does not justify a verdict of murder in the first degree, and the conviction ought not to be sanctioned by this court, either upon the facts or upon the law. (*People v. Conroy*, 97 N. Y. 62; *People v. Wood*, 126 N. Y. 249; *Leighton v. People*, 88 N. Y. 117.) The case was improperly submitted to the jury under the second clause of section 183 of the Penal Code. There was no proof in the case to warrant the submission of the case to the jury on the theory described in that clause of the section

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Points of counsel.

defining murder in the first degree. (*People v. Gallo*, 149 N. Y. 106.) The defendant had a legal right to have the jury instructed by the court as requested, that "the evidence of good character may create a doubt against positive evidence of the defendant's guilt," and the refusal of the court to so instruct the jury is reversible error. The whole charge on the question of good character is clearly erroneous. (*Remsen v. People*, 43 N. Y. 6; *Stover v. People*, 56 N. Y. 319; *People v. Sweeney*, 133 N. Y. 609; *People v. De Graff*, 5 N. Y. Cr. Rep. 561; *People v. Friedland*, 2 App. Div. 332; *People v. Drown*, 38 N. Y. S. R. 985; *People v. Clements*, 42 Hun, 355; *People v. Wileman*, 44 Hun, 190; *People v. Pallister*, 38 N. Y. 604; *People v. Leonardi*, 143 N. Y. 360; *People v. Corey*, 148 N. Y. 476.) The motion made to set aside the verdict and for a new trial should have been granted. (*People v. Hall*, 57 How. Pr. 346; Code Crim. Pro. §§ 135, 421, 425; *People v. Linzey*, 9 N. Y. Cr. Rep. 260; *Kehrley v. Shafer*, 92 Hun, 196.) The errors herein complained of were harmful, and affected a substantial right of the defendant. Whether or not they affected the verdict of the jury is not the province of this court to decide. (*People v. Corey*, 148 N. Y. 493.)

Eugene Burlingame for respondent. The record fails to show that "injustice has been done," or that "a different result ought to have been reached." (Code Crim. Pro. §§ 528, 542; *People v. Pallister*, 138 N. Y. 601; *People v. Shea*, 147 N. Y. 85; *People v. Barberi*, 149 N. Y. 271; *People v. Hoch*, 150 N. Y. 291, 301; *People v. Corey*, 148 N. Y. 506; *People v. Kelly*, 113 N. Y. 647; *People v. Cignarale*, 110 N. Y. 23; *People v. Fish*, 125 N. Y. 136-144.) The trial judge properly overruled defendant's challenge for bias to the juror Jacob Miller. (Code Crim. Pro. § 376; *Pierson v. People*, 79 N. Y. 429; *People v. Hoch*, 150 N. Y. 291.) The defendant was not prejudiced by the charge of the learned trial court on the question of good character. (*People v. Sweeney*, 133 N. Y. 609.) The court properly refused defend-

ant's motion for a new trial. (*People v. Wood*, 131 N. Y. 618.) There was no irregularity or impropriety in what was done by the jury. The defendant's rights were in no way prejudiced. (*People v. Buchanan*, 25 N. Y. Supp. 481; *People v. Hoch*, 150 N. Y. 291; Code Crim. Pro. §§ 425, 465; *People v. Johnson*, 110 N. Y. 134.)

HAIGHT, J. About eight o'clock in the morning of the 23d day of June, 1896, Elizabeth Hughson, the wife of the defendant, was found in the house occupied by her covered with blood and suffering from four gunshot wounds; one bullet had entered the back part of the head, struck the skull, deflected downward and lodged in the muscles of the neck; another had entered near the nose, passing nearly through the head, and embedded itself in the brain tissues; another had lodged in the bones of the wrist, and the other had passed through the index finger. She was conveyed to a hospital in the city of Albany where she died on the third day thereafter.

The defendant was twenty-six years of age. He had been married to the deceased two years and they had one child. On the 17th day of September, 1894, he entered the employ of Charles Hinckel in the capacity of a coachman and took up his residence with his wife in the lodge house upon the Hinckel premises, within a few rods of the city line of the city of Albany. In February, 1895, one Anna Rohloff was employed by Mr. and Mrs. Hinckel as a cook in their residence, which was situated a few rods back from the lodge house which stood at the entrance to their grounds. Shortly thereafter Mrs. Hughson became violently jealous of Anna Rohloff and accused her of being intimate with her husband and repeated these charges to Mrs. Hinckel. From that time on frequent quarrels appear to have taken place between Mrs. Hughson and the defendant with reference to the Rohloff girl, until finally it culminated in her refusing to cook for him and of his refusing to stay with her in the lodge house. He thereafter took his meals in the kitchen of the Hinckel residence and slept in the club room of the carriage house. About three

weeks before the homicide he went to a pawn shop on Green street in Albany and purchased a pistol together with a box of cartridges. He then returned to the Hinckel residence and loaded the pistol with four cartridges, leaving two empty chambers. After loading the pistol he placed it in his hip pocket and continued to carry it until the morning of the homicide. On Monday, the 22d of June, Mrs. Hinckel and Anna Rohloff went to Albany in the carriage, the defendant driving. After doing some shopping, the defendant, under the directions of Mrs. Hinckel, drove Anna to her own home on Fourth avenue. It was then arranged that he was to meet her at the end of the Madison avenue street car line at the corner of Allen street, about twenty-five minutes after ten o'clock, for the purpose of conveying her to the Hinckel residence. He then returned home, put his horses out, and went to his house between six and seven o'clock. It then appears from his statement in the case that he and his wife had another quarrel, she inquiring who went to town with Mrs. Hinckel, and on being informed that it was Anna, spoke of her as a vile person, saying that he was a nice coachman to be driving her about the city and that she supposed he was going for her again that night, and he said he was. Other expressions then followed which it is unnecessary to repeat, which very plainly indicated her displeasure and disgust. At the appointed hour he drove over to the end of the car line, got Anna and returned, reaching the Hinckel residence about forty minutes after ten o'clock in the evening. He states that he drove to the barn, put out his horse, asked Anna to get him the key to the ice house so that he could get a bottle of beer; that after he got the beer, he sat down upon the cellar door at the rear of the kitchen of the Hinckel house, drank it and smoked his pipe. He tells us that he sat there alone from half to three-quarters of an hour. He then went to the lodge house and found the door locked, but his wife got up and let him in. She then asked him where he had been since he came from the car. He told her, and that he had got a bottle of beer and smoked his pipe. She says, "You lie; you have been over in

the kitchen again with the whore." I says, "Lizzie, I have not; I have not seen Anna since she locked the door and went upstairs." She says, "I know better, and if this thing don't stop I am going to leave you." I asked her then what she was going to do, if she was going to get the divorce she said she was going to get from me. She says, "No, I will not disgrace my people by getting a divorce. Before I will do that, I will kill myself." I says, "Go on to bed; I don't feel like quarreling to-night; I have a headache, and I don't want to have anything more to say to you about it." She says, "I will not shut up," and she whirled around to the stand that set at the side of the bedroom door and picked up a saucer and threw it at me. I jumped up and threw my hand up over my head to ward off the blow, and I lost myself entirely from that time." "When I woke the next morning I was in the club room on the floor. I had my coat and clothes on the same as I was the night before. The minute I woke up it came to me about my wife quarreling with me and some way that I had heard a pistol shot, I could not remember. I thought I heard a pistol shot some time during the night. I jumped up and grabbed my pistol out of my pocket to see if it had been shot, and the cylinder of it was gone and I went right out in the wagon house, started to go over home. When I got where I could see the clock it was twenty minutes of six, and I expected Mr. Hinckel out any minute to take his horse, so I put on my overalls and jacket and went in the stable and got his horse ready, and I just got his horse hooked when he came out and drove away. As soon as he drove away I took the pistol that I had, what was left of it, and walked around back of the icelhouse and threw it under the corner of the old carriage house. I was scared; I didn't know what to do. I went back and started to go over to my house to see if I was right in hearing that pistol shot. I got over as far as the little play house for the children and looked over to the house and saw smoke coming out of the chimney, and I thought then everything was all right, that she was up; so I turned and went back to the barn." This is the defend-

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ant's version of the transaction. It appeared, however, the next morning, that the front door was locked and that the door between the living part and the new apartment which was being fixed was bolted or fastened, and that in order to enter the living room he and another man had to push the door open. There was evidence tending to show that the drawers had been opened and the contents scattered about the room; that the money in Mrs. Hughson's purse had been taken from it and it lay open upon the stand; that a half-dozen silver-plated salt cellars had been taken from the house and were subsequently found under the carriage house where he had thrown his pistol. When entrance was first effected to the house in the morning Mrs. Hughson was standing behind the door. When questioned as to what was the matter with her, she replied that she had fallen down stairs, but subsequently, after a neighboring woman had arrived, and it was found that she had gunshot wounds, she said in the presence of her husband that he had done it. This he denied, but he had made the statement that she had been shot before that fact had been discovered by others, and he evidently sought to have the impression go out that the house had been entered by burglars who had done the shooting. We have but briefly alluded to the evidence, passing over many of the details without mention. It was submitted to the jury upon an impartial charge, and the verdict has been found against the defendant. We have carefully examined the evidence, and are fully satisfied that it supports the conclusion reached by the jury. The circumstances quite clearly indicate deliberation and premeditation. He had never been in the habit of carrying a revolver until within three weeks of the homicide, and not then until the relation between himself and his wife had become so strained that they could not longer live together. It is true that he claims to have purchased it for the purpose of killing dogs, but he put it to a very different use. The opening of the drawers, the scattering of the contents about the room, the taking of the salt cellars and the emptying of the purse, all tended to support

the theory that the house had been entered by burglars, and in view of his subsequent admission, practically to the effect that the shooting was done by himself, although, he claims, while in an unconscious condition, leaves no reasonable doubt but that there was deliberation and premeditation prior to the doing of the act.

In impaneling the jury Jacob Miller was challenged for bias by the defendant. The challenge was overruled by the court and an exception taken. He was then sworn and served as a juror upon the trial, no peremptory challenge being interposed. Upon his examination he was asked if he entertained any prejudice against a party in possession of a pistol or revolver. He answered: "Unless he has permission to carry such a weapon. Q. Suppose he has not permission? A. Then I have. Q. Strong? A. Yes, sir. Q. And decided? A. Yes, sir. Q. So strong it might influence your verdict? A. Not a bit. Q. The evidence would have to be stronger in his behalf than though the pistol was not spoken of? A. Yes, sir. Q. Whether used or not? A. Yes, sir. Q. You say you entertain a strong prejudice against a party having in his possession firearms? A. Yes, sir. Q. If you were accepted as a juror and it should develop on the trial that he was in possession of a firearm, would that prejudice, influence your verdict? A. No, sir; not a bit. * * * Q. Do you believe that the prejudice you would have against a party carrying a pistol would influence your verdict upon the evidence that might be submitted? A. Not a bit."

We think no error is presented by the ruling of the court. It will be observed that the examination of the juror was with reference to an abstract question, which so far as it then appeared was not involved in the case. It is true that upon the trial it appeared that the defendant had a pistol in his possession and the jury has found that it was the weapon with which the murder was committed. But it does not appear that the trial court at the time the ruling was made was advised that any such evidence would be presented, and if it had appeared we should still be inclined to the view that

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the ruling should be sustained. Every time the attention of the juror was drawn to the trial of the case and questioned as to whether the possession of a revolver would in any wise prejudice or influence his mind with reference to his arriving at a verdict, he distinctly answered that it would not a bit. We do not understand that a juror can be disqualified by asking questions with reference to his views, or the effect that would be produced upon his mind from certain evidence which may be produced upon the trial. If so, criminal trials in many instances could be avoided for the reason that it might be impossible to find qualified jurors to sit upon the trials. If a person placed upon trial charged with the crime of burglary, who, upon being searched at the time of his arrest, was found to have burglar tools secreted in his clothing, should be permitted to disqualify jurors by showing that they had prejudice against men who carried upon their persons such instruments, it might be impossible to find a qualified jury before whom the person could be tried. We doubt if a worthy jurymen could be found who could conscientiously testify that he regarded such a person with the same favor as one who had never had such implements in his possession. The same may be true with reference to a revolver carried by a person for an unlawful or improper purpose. Such conduct on the part of a person may not be sanctioned or approved by law-abiding citizens. But the fact that the jurymen does not approve of the carrying of a revolver or other concealed weapon in violation of the statute, does not necessarily disqualify him from serving upon a jury or prevent him from determining the guilt or innocence of the accused as an impartial juror.

Upon the trial, Pauline Goutchy testified that, on the morning after the shooting, and while Mrs. Hughson was being washed, witness, in the presence of the defendant, asked her how it happened, and that she replied, "Ed did it," referring to her husband; that the witness then turned to the defendant, who stood by, and said to him, "Ed, is it possible that you done this?" That then he began to cry and said, "Oh,

no! I didn't do it, and I couldn't do anything like that." And then he went away.

Declarations or statements made in the presence of a party, when admissible, are taken, not as evidence in themselves, but to enable the court or jury to understand the force and effect that should be given to the reply made thereto by the party affected. (*Gibney v. Marchay*, 34 N. Y. 301; *People v. McCarthy*, 110 N. Y. 309, 315; *Missouri v. Devlin*, 7 Mo. App. Rep. 32; *Iowa v. Nash*, 7 Clarke (Ia.), 347, 376; *Watt v. Illinois*, 126 Ill. 9; *S. C.*, 1 L. R. A. 403; 2 Wharton's Law of Evi. § 1136; Cowen & Hill's Notes to Phillips on Evi., notes 191, 192.) The action, conduct and statements of a person charged with crime immediately after its commission often have an important bearing upon the question of his guilt or innocence. If he attempts an escape or secretes himself or makes false, contradictory or inconsistent statements, they all properly become the subject of inquiry upon the trial.

It is thus apparent that, under the rule to which we have called attention, the declaration of Mrs. Hughson to the effect that her husband had shot her was not evidence, or entitled to be received as evidence that he did do the shooting, but that it could only be taken for the purpose of enabling the jury to understand the force and effect that should be given to the reply made by him. If the defense interposed upon the trial had proceeded upon the theory that the shooting was done by some person other than the defendant, and this evidence was introduced solely for the purpose of getting before the jurors the statement of the deceased accusing the defendant, instead of enabling them to draw conclusions from his answer made to the charge, in view of the fact that he then and there denied the shooting, it is quite possible that an orderly administration of the criminal law would require that he should be given a new trial. His case was, however, defended upon a different theory. When the crime was discovered, he first suggested the theory that the house had been broken into by burglars and the shooting done by them, and

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then, as we have seen, he denied that it was done by himself. Subsequently, he admitted that he had purchased a revolver on Green street in the city of Albany; that he had loaded it with four cartridges and that he carried it in his hip pocket; that he was in the house in company with his wife at a late hour on the night of the homicide; that they had a violent quarrel in which she threw a saucer at him, and that he then suddenly lost control of himself and knew nothing further until he awoke the next morning in the carriage house; that immediately upon awakening he recalled the quarrel of the night before, and had the impression that he had heard a pistol shot; that he immediately drew his revolver from his pocket for the purpose of seeing whether it had been fired, and on making the discovery that it had been used he became frightened and threw it under the barn. He thus, in effect, admitted the shooting, and his defense was that it was done at a time when he was unconscious and not criminally responsible for his acts. Upon this theory his actions, conduct and statements the next morning became important as bearing upon his mental condition. If, at the time he was charged with the crime, he knew that the shooting had been done by himself and he denied it, it was a circumstance which the jury might properly consider as bearing upon the question of his guilt and his mental responsibility. We are, therefore, of the opinion that the evidence was competent.

The court, in submitting the case to the jury, defined the crime of murder in the first degree by reading the provisions of the Penal Code with reference thereto, including the statutory definition of an act eminently dangerous to others and evincing a depraved mind regardless of human life, together, also, with the provision with reference to the effecting the death of a person whilst engaged in the commission of a felony. He then charged the jury that it must be with a pre-meditated design to effect the death of the person killed, and that, before they could convict the defendant of murder in the first degree, they must find that there was that degree of

deliberation and premeditation which is contemplated by the statute. He did not, in specific terms, withdraw from the attention of the jury the killing of a person by an act imminently dangerous to others, or whilst engaged in the commission of a felony. He did, however, as we have seen, limit their consideration to the killing with deliberation and premeditation, so that we think there can be no question but that the jury properly understood the court with reference to the crime submitted to them for their determination.

At the close of the trial the defendant requested the court to charge that the evidence of good character may create a doubt against positive evidence of defendant's guilt. The court replied: "It is for the jury to say. The evidence of good character is evidence which must be considered, and if, in the judgment of the jury, that good character does raise a doubt against positive evidence, they have a right to entertain that doubt, and the prisoner must have the benefit of it." An exception was taken to the charge as made by the court. We think the remarks of the court embraced every element of the request. Good character may create a doubt against positive evidence, but this doubt against positive evidence is created only when, in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence. In such a case the prisoner must be given the benefit of the doubt. The charge was correct; it but amplified and made more plain the request.

A motion was made to set aside the verdict upon various grounds, among which is the claim that the defendant was prejudiced by the leaving in the jury room the blood-stained garments of the deceased, which had been made exhibits upon the trial. Section 425 of the Code of Criminal Procedure provides that the court may permit the jury, upon retiring for deliberation, to take with them any paper or article which has been received as evidence in the case, but only upon the consent of the defendant and the counsel for the People. The evidence presented upon the motion tends to show that at the time the jury was about to retire the question was asked as to

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whether they should be given the exhibits, and that thereupon the court inquired if there was any objection. None being made, they were given the exhibits that had been admitted in evidence upon the trial. The defendant now contends that he understood that only the paper exhibits were to be given to the jurors, and did not understand that the clothing was to be further inspected by them. We think, however, that the term "exhibits" embraced in the inquiry of the court had reference to the clothing as well as the other articles and papers, and that if the defendant did not wish them to be left in the charge of the jury, an objection should have been interposed when the court asked if there was any objection.

No other exception is presented which requires consideration here.

The judgment and conviction should be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MARTIN V. STRAIT, Appellant.

1. CRIMES — INSANITY AS A DEFENSE — QUESTION OF INTOXICATION RAISED BY PROSECUTION — EVIDENCE. If, after the defendant in a criminal action has rested his defense, based upon insanity, the prosecution raises a new issue by introducing evidence tending to show that the defendant was intoxicated and that the acts and conditions relied upon by him as evidence of insanity should be attributed rather to intoxication, evidence on the part of the defendant tending to contradict the fact and theory of intoxication cannot properly be excluded on the ground that it is a reopening of the defendant's case.

2. REBUTTAL OF EVIDENCE GIVEN IN ANSWER TO DEFENSE OF INSANITY. An attempt on the part of the defendant in an action defended on the ground of insanity, to disprove the evidence of the prosecution given in answer to his proof upon the question of insanity, and upon a subject which he was not required to anticipate, is not a reopening of the defendant's case.

3. REJECTION OF COMPETENT EVIDENCE — REVERSIBLE ERROR — CODE CR. PRO. § 542. When the rejection of competent and material evidence is harmful to the defendant and is excepted to, it affects a substantial right and presents an error which cannot be disregarded in a criminal

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case, under section 542 of the Code of Criminal Procedure, but it requires a reversal even though the appellate court, with the rejected evidence before it, would still come to the same conclusion as that reached by the jury.

(Argued October 13, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Supreme Court, entered December 18, 1896, in Chemung county, upon the verdict of a jury convicting the defendant of murder in the first degree, and from an order denying his motion for a new trial made on the minutes of the trial court.

The facts, so far as material, are stated in the opinion.

H. H. Rockwell for appellant. The verdict was against the evidence on the issue of defendant's insanity. (*People v. Taylor*, 138 N. Y. 406.)

Charles H. Knipp for respondent. The verdict is abundantly supported by the evidence as to felonious intent, premeditation and deliberation, and, therefore, is conclusive in this court. (*People v. Conroy*, 97 N. Y. 62; *People v. Cignarale*, 110 N. Y. 26; *People v. Kerrigan*, 147 N. Y. 210; *People v. Sliney*, 137 N. Y. 570; *People v. Hoch*, 150 N. Y. 291; *People v. Taylor*, 138 N. Y. 398; *People v. Youngs*, 151 N. Y. 210; *People v. Corey*, 148 N. Y. 476; Code Crim. Pro. § 528.) The defendant was sane and legally responsible for his act. (*People v. Montgomery*, 13 Abb. Pr. [N. S.] 245; *Willis v. People*, 32 N. Y. 715; *People v. Taylor*, 138 N. Y. 398; *People v. Lippy*, 128 N. Y. 629; *People v. Trezza*, 125 N. Y. 740; *People v. Fish*, 125 N. Y. 136; *People v. Stone*, 117 N. Y. 480; *People v. Hoch*, 150 N. Y. 291; *People v. Kerrigan*, 147 N. Y. 210.)

MARTIN, J. At a term of the Court of Oyer and Terminer held in the county of Chemung in November, 1894, the defendant was indicted for the crime of murder in the first degree. It was charged that on the sixteenth day of November, 1894, at the city of Elmira, in that county, he deliberately and with premeditation shot and killed his wife, Joan H. Strait.

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In the following May he was tried and a verdict of guilty was rendered. From the judgment of conviction entered on that verdict he appealed to this court, where it was reversed and a new trial granted. (148 N. Y. 566.) The reversal was upon the ground that the court erred in admitting improper evidence. The defendant was again tried at a term of the Supreme Court held in that county commencing December 7, 1896, and was again convicted of the same crime. When arraigned for sentence his counsel moved for a new trial upon the minutes under section 465 of the Code of Criminal Procedure and the motion was denied. From the latter judgment and the order an appeal has been taken to this court.

That the defendant, at the time and place alleged, shot his wife, and that she died from the result of the wounds thus inflicted, were proved and not denied. Indeed, that the defendant killed her was conceded on the trial and is conceded here. The only issue of fact presented in the case was that of the defendant's sanity. His defense was that when the homicide occurred he was laboring under such a defect of reason as not to know the nature and quality of his act or that it was wrong.

A great amount of evidence was introduced by each party, and witnesses, both lay and expert, were called and testified upon that issue. The witnesses called by the defendant gave testimony tending to show that he was laboring under such a defect of reason as not to know the nature and quality of his acts, or that they were wrong. Upon the other hand, the testimony of the People's witnesses tended to show that he was sane and responsible for his acts. With our views of this case we deem it unnecessary to consider the facts, or to do more than examine a few of the exceptions taken by the defendant.

On the trial, after the People rested and the case had been turned over to the defendant and he had introduced his proof and rested his defense, the People proved that the defendant, to a greater or less extent, indulged in the use of intoxicating drinks, and that upon the day of the homicide he had been

drinking. The court then permitted the prosecution, under the objection and exception of the defendant, to ask its expert witnesses whether all of the conditions of mental disturbance described in the hypothetical question put to witnesses for the defendant might not be accounted for on the ground of intoxication, and they testified that they thought they might. The prosecution was also permitted to prove by its experts that the conditions mentioned, which were the result of intoxication, might exist and pass away when the intoxication was terminated and the person be sane all the time.

Without referring specially to the various instances contained in the record it may be said generally that the learned district attorney made a continued and persistent effort during the entire trial of the issue to establish that the defendant drank intoxicating liquors habitually, and that he was intoxicated upon the day of the homicide. This effort was opposed by the defendant with equal persistence. The evidence, however, was admitted. The district attorney also sought to establish by the evidence of the experts called in behalf of the People that all the acts and conduct of the defendant, which were relied upon by the defense as evidence of insanity, might be accounted for on the ground of his intoxication. Witnesses called by the People were permitted to give testimony to that effect. After this evidence had been received, the People for a second time rested.

The defendant then recalled Dr. Wagner, who was a qualified expert, and offered to prove by him whether alcohol when taken internally acted upon the brain, was a direct brain poison, or was regarded as a cause of insanity. To this proof the district attorney objected upon the ground that it was reopening the case, the court sustained it, and the evidence was excluded. The defendant also sought to prove that he did not use intoxicating liquors, or at least to the extent testified to by the witnesses for the People. This evidence was also objected to by the district attorney upon the same ground, and excluded by the court. To all of these rulings the defendant duly excepted. That the purpose of this evidence

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was to disprove the theory of the prosecution, that the acts and conditions relied upon by the defendant as evidence of insanity might be attributed to his intoxication, is manifest. It is equally manifest that the object of showing that he did not indulge in the use of intoxicating drinks or to the extent proved by the witnesses called by the prosecution, was also to contradict and disprove that theory.

It is extremely difficult to discover any ground upon which these rulings can be sustained. An examination of the record discloses that the issue of intoxication, so far as it was a basis of explaining the defendant's acts as consistent with sanity, was one presented by the People and upon which they introduced a great amount of evidence both as to the fact and by opinions of experts, while no such issue was, or could well have been, raised by the defendant, as it was totally inconsistent with the theory of his defense.

After the People had been permitted to introduce this evidence, including the opinions of experts that all the conduct and conditions proved by the witnesses for the defendant might be attributed to intoxication rather than to insanity, we do not think the evidence offered by the defendant can be regarded other than in rebuttal of that given by the People when seeking to establish the sanity of the defendant, and that the court erred in rejecting it upon the ground that it was reopening the case.

It is doubtless true, as suggested by the court, that the defendant had been combatting the theory of intoxication "all the way through." But that issue was not tendered by the People until the defendant had rested, and, hence, he had no proper opportunity to present his evidence upon that question. Up to that time he could combat the question only by the cross-examination of adverse witnesses. He was not bound to content himself with that, but had a legal right to disprove the claim of the prosecution by witnesses who had not been called to testify against him. Moreover, not until then could he have properly proved by his expert witnesses that the effect of intoxication would not have been as testified

to by the experts for the People. When the People rested upon the issue of insanity, was the first time that that class of evidence was properly admissible. Until then the case had been in the hands of the People since that issue was in fact raised. The defendant not only attempted to disprove what the prosecution had proved as to his intoxication, but also to establish by a witness who was qualified that, if the facts were as claimed by the prosecution, it could not have produced the result testified to by its experts. That the evidence, if it had been admitted, would have had an important bearing upon the question in issue, there can be little doubt.

As the defendant's sanity was the only issue that was seriously litigated upon the trial, it cannot be said that the rejection of this evidence could not have legitimately affected the result. Upon that issue it was claimed and proved by the People that the acts and circumstances relied upon by the defendant as evidence of his irresponsibility for his acts, might well be accounted for upon the theory of his intoxication. If true, this evidence weighed heavily against the defendant. He sought to disprove it by showing, *first*, that he was not intoxicated, or at least to the extent claimed by the People, and, *second*, that it could have had no such effect as claimed and testified to by the People's witnesses. But he was prevented from introducing that evidence upon the theory that it was reopening his case. We do not think that ruling can be upheld. It is manifest it was not a reopening of the case, but an attempt upon his part to disprove the evidence of the People given in answer to his proof upon the question of his insanity, and upon a subject which he was not required to anticipate until the evidence relating to it had been introduced by the learned district attorney.

The counsel for the defendant then asked the same witness the following question: "Now I ask you if the fact that, on the day of the commission of the homicide—I judge you have become familiar with the history of this case—the accused met certain acquaintances upon the street and bowed to them and recognized them and even had conversation with

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them, during which those witnesses observed nothing peculiar in his appearance; that his appearance did not impress them as either natural or unnatural, or rational or irrational, no more than would the appearance of any other acquaintance, whether the fact of itself would afford any evidence whatever as to the sanity or insanity of the accused on that day, assuming the conditions to remain as they were when you were formerly on the stand and asked as to his condition?" This question was objected to as reopening the case, the objection was sustained, and the defendant excepted. What has already been said in regard to the exclusion of the other evidence which was objected to upon the same ground, applies with equal force to this ruling.

It is well settled in this state that a party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue, and if the court excludes such evidence, its rejection must be regarded as substantial error for which the judgment must be reversed upon appeal, unless it can be plainly seen that the rejection could not have legitimately affected the result, and if properly excepted to can be disregarded on appeal only when it can be seen that it did no possible harm. (*Hobart v. Hobart*, 62 N. Y. 80; *Footte v. Beecher*, 78 N. Y. 155; *Carroll v. Deimel*, 95 N. Y. 252, 256; *Holcomb v. Holcomb*, 95 N. Y. 316.)

The errors in rejecting this evidence cannot be disregarded under section 542 of the Code of Criminal Procedure. That section provides that on appeal the court must give judgment without regard to technical errors or to defects or to exceptions which do not affect the substantial rights of the parties. The rulings in this case clearly are not within the principle of that provision. That the rejection of this evidence was a technical error or that it did not affect a substantial right of the defendant cannot be held. That statute is but little more than a codification of the previously-established rule that even in criminal cases a new trial will not be granted for an erroneous ruling, where the appellate tribunal can see that by no

possibility could the error have worked harm to the defendant. (*Stokes v. People*, 53 N. Y. 164.) Neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a substantial right, even though the appellate court, with the rejected evidence before it, would still come to the same conclusion reached by the jury. The defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury, and have the opinion of the jury taken upon all the evidence which is proper and admissible in the case. (*People v. Wood*, 126 N. Y. 249.)

We are of the opinion that these rulings cannot be sustained, and that the judgment must be reversed and a new trial granted.

All concur.

Judgment reversed and new trial granted.

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WILLIAM LORD, as Executor of MARTHA A. CRONIN, Deceased,
Respondent, v. JOHN H. CRONIN, Appellant.

HUSBAND AND WIFE—MONEY FURNISHED HUSBAND BY WIFE—EXPRESS CONTRACT BY HUSBAND TO REPAY ON CONTINGENCY OF WIFE'S SURVIVAL—ENFORCEMENT OF IMPLIED OBLIGATION, ON ANNULMENT OF CONTRACT BY PRIOR DEATH OF WIFE. A married woman owning real estate conveyed a parcel, on which there was an outstanding mortgage, to her husband, and to enable him to pay off the incumbrance raised the amount thereof by executing a mortgage on other property belonging to her, securing a bond which her husband signed with her, on receiving from her husband a written agreement, signed by him alone, whereby he covenanted that if he should die before his wife, the sum raised by the wife's mortgage should be a charge upon his estate and paid as a debt owing by him, and that his estate should convey to her his interest in certain real estate (which, it was claimed, she had given to him), followed by the statement that if his wife should not survive him, the agreement should be of no effect. The husband survived the wife, and her executor sued him for the sum claimed to have been lent to him by her. *Held*, that the money furnished to the

husband by the wife constituted a loan, independently of the husband's written agreement; that as that agreement had, by its terms, become of no effect through the death of the wife, the parties were remitted to such obligations as arose from the loan and failure to pay it; and, hence, that the action was maintainable and a recovery justified.

Lord v. Cronin, 9 App. Div. 9, affirmed.

(Argued October 11, 1897; decided October 28, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 21, 1896, reversing a judgment in favor of defendant entered on a nonsuit granted at Circuit and granting a new trial.

This action was brought to recover the sum of \$8,000 which the plaintiff's testatrix is alleged to have lent to the defendant on or about the second day of May, 1892. The answer contains in substance a general denial and several affirmative defenses not material on this appeal.

Upon the trial it appeared that prior to May, 1892, the testatrix, who was the wife of the defendant, owned several parcels of real estate, and that she had conveyed one piece to her husband, upon which there was a mortgage for \$8,000 outstanding and unpaid. Mr. Cronin wished to pay off the mortgage and Mrs. Cronin borrowed \$8,000 by mortgaging other real estate belonging to her in order to lend it to him for that purpose. He signed the bond, to which the mortgage last named was collateral, with his wife. She refused, however, to execute the mortgage until he signed and delivered to her a written instrument of which the following is a copy:

"This agreement, made this second day of May, in the year of our Lord one thousand eight hundred and ninety-two, between John H. Cronin and Martha A. Cronin, of the city of Troy, county of Rensselaer and state of New York, witnesseth, that in consideration that my wife, Martha A. Cronin, has this day mortgaged certain premises of hers, situate upon the northwest corner of Fulton and Mechanic streets in said city of Troy, to Samuel P. McClellan, as executor of the will of Jane Calkins, deceased, for the sum of eight thousand dol-

lars, at my request, and has loaned to me said sum so borrowed as aforesaid, now, in consideration thereof, I, John H. Cronin, husband of the said Martha A. Cronin, do hereby covenant and agree that if it shall occur to me to die before the decease of the said Martha A. Cronin, the said sum of eight thousand dollars so procured as aforesaid shall be a charge upon my estate, and shall be paid as a debt owing by me, I having become a party to the bond given upon such borrowing; and I further agree that in such case my executor or administrator, or personal representatives, shall convey to the said Martha A. Cronin, surviving me, all my one-half interest in the premises known by street numbers 107 Fourth street and 2260 Fifth avenue, in the city of Troy, to have and to hold unto the said Martha A. Cronin, her heirs and assigns forever.

“But if the said Martha A. Cronin shall not survive me, then this agreement shall be of no effect.

“In witness whereof I, the said John H. Cronin, have hereto set my hand and seal in duplicate, this 2d day of May, 1892.

“J. H. CRONIN. [L. s.]”

This instrument was executed in triplicate and duly acknowledged, one of the originals being delivered to Mrs. Cronin, another to the mortgagee, while the third was retained by the defendant. Upon the trial the plaintiff offered said agreement in evidence, and furnished some slight proof of a loan independent of that paper, but when he rested the trial court dismissed the complaint upon the ground that Mrs. Cronin intended the so-called loan to her husband as a gift in case she died before him. The Appellate Division reversed the judgment upon the ground that as Mrs. Cronin neither signed the instrument nor expressed any intention to forgive the debt, and as by her death the instrument had by its terms become of no effect, the parties were remitted to such obligations as arose from the loan and the failure to pay it. The defendant thereupon appealed to this court.

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Opinion of the Court, per VANN, J.

E. Countryman for appellant. It was made a condition precedent to her right of recovery that the wife should survive her husband; and as the occurrence of that event is of the essence of the contract, it cannot be ignored in determining the rights of the parties. (*Clason v. Bailey*, 14 Johns. 484; *James v. Patten*, 6 N. Y. 9; *Justice v. Lang*, 42 N. Y. 494; *Mason v. Decker*, 72 N. Y. 595; *Egleston v. Knickerbocker*, 6 Barb. 458; *Drake v. Seaman*, 97 N. Y. 230; *Mentz v. Newwitter*, 122 N. Y. 491; *Horn v. Hanser*, 56 Minn. 43; *Van Dorn v. Robinson*, 16 N. J. Eq. 256; *Miller v. Cameron*, 45 N. J. Eq. 95.)

Charles E. Patterson for respondent. The death of Mrs. Cronin did not operate as a payment of the loan of \$8,000, nor change its character so as to constitute it a gift. (*French v. Carhart*, 1 N. Y. 102; *Coleman v. Beach*, 97 N. Y. 545, 554; *Russell v. Allerton*, 108 N. Y. 288.) There is no question of usury in this case. (4 R. S. [8th ed.] 2512; *H. Ins. Co. v. Dunham*, 33 Hun, 415.)

VANN, J. The contract in question, although unilateral in form, was binding upon both parties named therein, as one had assented thereto by subscribing his name at the end thereof, and the other by accepting the instrument so signed as a valid and operative agreement and acting thereupon. (*L'Amoureux v. Gould*, 7 N. Y. 349; *Justice v. Lang*, 42 N. Y. 493, 498; *Mason v. Decker*, 72 N. Y. 595.) It is to be observed, however, that every express promise appearing in the contract was made by the defendant, who covenanted in the first place that if he should die before his wife, the sum borrowed should be a charge upon his estate and paid as a debt owing by him; and in the second place that, upon the same contingency, his estate should convey to her his one-half interest in certain real estate, which, as it is claimed, she had given to him. Finally, he declared by the closing sentence that both of these covenants should be void, provided his wife should not survive him. She made no express promise whatever, either by way of releasing the

debt absolutely or conditionally, or any other. The instrument is silent as to the rights or obligations of either party in case the husband should prove the survivor. That contingency is not provided for, even by implication, as the agreement by its terms was to be of no effect unless Mrs. Cronin should live the longer. The argument, therefore, founded on the relations of the parties and the covenant of the husband not only to pay the debt to his wife, but also to convey land to her in addition if she survived him, to the effect that the loan was by implication to become a gift as a part of a family arrangement if he survived her, cannot be sound, because in the latter event, the agreement was to be the same as if it had never been made. Neither the express nor the implied covenants, if any, survived the death of the wife, for the life of the agreement in all its parts was to cease with her own, provided her husband still lived. Nor does the contention that the written agreement is presumed to express the entire contract between the parties rest on any better foundation, for when the wife died there was no agreement. It had ceased to exist by virtue of its own stipulations. It simply provided for a contingency that never happened, and as it has now turned out never can happen, and as soon as this became certain through the death of Mrs. Cronin, the agreement was, according to its express words, "of no effect." Whatever the presumption might have been if the agreement had been kept in force by the happening of the other contingency, to wit, the death of Mr. Cronin before that of his wife, it is unnecessary to consider, because as she is dead while he still lives, there is no longer any agreement for the presumption to operate upon. The written and conditional promise of the defendant to pay was not the sole consideration for the loan, because, if a certain event happened, the agreement containing that promise was wiped out, which left the original implied promise to repay in force. It was not agreed either in express terms or by reasonable implication that, unless the debt was paid as provided in the contract, it was not to be paid at all. Under these circumstances, we think, as the learned Appellate Division held, that "the parties are

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remitted to such obligations and duties as the loan and its non-payment imply," for, unless the debt created by the loan was extinguished by the agreement, it was not extinguished at all.

What, then, it is pertinently asked, was the object of the defendant in executing a contract apparently so one-sided? His primary object, of course, was to secure the loan, which Mrs. Cronin refused to make until he signed the contract. As she gave a mortgage upon her own property and he signed the bond with her, upon the face of the transaction she might appear to be the principal debtor, so that if he should die first she would need some written evidence that the mortgage was given to raise money to lend to him and that the amount thereof was to be repaid by him or his estate. It was not unnatural that she should request this or that he should comply with her request in order to get the money from her. The promise to convey the land to her if she survived him was simply a promise to restore what she had given him, so that she could have it instead of his heirs. Whether there was the further object of postponing the time of payment until the death of one of the parties, for as long as the contract was in life all implied promises were in life also, or of substituting the conveyance of land in the place of paying interest, if Mrs. Cronin survived her husband, it is unnecessary to decide.

The case is peculiar and not without difficulty, but we think that the conclusion reached by the Appellate Division is correct and that their judgment should be affirmed, and judgment absolute rendered against the appellant upon his stipulation, with costs.

GRAY, O'BRIEN and HAIGHT, JJ., concur; ANDREWS, Ch. J., and BARTLETT, J., dissent on the ground that the only evidence of a loan was contained in the writing, and that by the writing, by fair construction and in view of the relation of the parties, the only obligation assumed by the husband was contingent upon the wife's surviving; and MARTIN, J., dissents generally.

Judgment accordingly.

SAMUEL BACHRACH, Respondent, v. THE MANHATTAN RAILWAY
COMPANY et al., Appellants.

APPEAL — MOTION TO DISMISS — FRIVOLOUS EXCEPTIONS. To sustain a motion to dismiss an appeal before argument, on the ground that the judgment below has been unanimously affirmed by the Appellate Division as to the facts and that the exceptions in the case are frivolous, the exceptions must be so obviously frivolous on their face as to require no argument to demonstrate it.

Reported below, 1 App. Div. 634.

(Argued October 18, 1897; decided October 26, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 24, 1896, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The grounds of the motion are stated in the opinion.

Charles A. B. Pratt for motion.

Charles A. Gardiner opposed.

Per Curiam. This is a motion by the plaintiff to dismiss the appeal upon the ground that the judgment below has been unanimously affirmed by the Appellate Division as to the facts, and that the exceptions in the case are frivolous.

This motion is one of a large class imposing much labor on the court, and that ought not to be made.

An exception must be so obviously frivolous on its face as to require no argument to demonstrate it.

In this case briefs are submitted, citing authorities to support the opposing views. The fact that such a course is necessary is conclusive evidence that the motion should be denied.

An examination of this record discloses a number of exceptions that can only be disposed of after argument of the appeal.

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Statement of case.

The rule in motions of this character is similar to that applied to a party asking judgment on a frivolous pleading.

This memorandum is handed down in order that the bar may understand the strictness of this rule.

Motion denied, with ten dollars costs.

All concur.

Motion denied.

CHARLES McLOUTH, Respondent, and PLINY T. SEXTON, Appellant, as Trustees under the Will of CAROLINE CUYLER, Deceased, v. GEORGE C. HUNT et al., Respondents.

154	179
e160	615
160	617

154	179
165	489
j165	493

154	179
e172	*141
e172	*142
172	*145

1. **APPEAL — TESTAMENTARY TRUST.** Where there remains a possibility that the contingencies contemplated by a will, upon which remainders to the immediate beneficiaries of a trust may be defeated, will happen, the question as to whether certain items are to be treated as income or as capital is one in which the trustees have a legal interest sufficient to warrant an appeal.

2. **LIFE TENANT AND REMAINDERMAN.** Where a will creates separate trusts in favor of each of certain persons in being, who are to receive the respective incomes until they arrive at a certain age and then are to receive the *corpus*, such beneficiaries are to be considered as life tenants before reaching the specified age and as remaindermen thereafter; and the principles governing those relations are applicable to questions as to whether items of the trust property are to be treated as income or as capital.

3. **PREMIUM UPON TRUST SECURITIES.** The question whether the depreciation, through approaching maturity, of the premium upon government securities constituting the capital of a testamentary trust estate, and transmitted by the testator, should be borne by the life tenant or by the remainderman, is to be determined by the meaning and intention of the testator, derived from the language employed in the creation of the trust, the relation of the parties to each other, their condition and all the surrounding facts and circumstances.

4. **DEPRECIATION OF PREMIUM UPON UNITED STATES BONDS.** A testatrix, in creating a trust of which her grandchildren were, in effect, made life tenants up to a specified age and then remaindermen, directed that while life tenants they should receive the "full income." She owned certain United States bonds which were apportioned by the surrogate to the capital of the trust, at a premium, and they were so retained by the executors as trustees. *Held*, that it was her intention that the life tenants should receive the whole annual interest of the bonds without diminution by the reservation of a portion thereof to meet any depreciation in

the market value of the bonds through their approaching maturity — that is, that the premium should not be charged to the life tenants; and that this intention of the testatrix was controlling.

5. PREMIUM UPON TRUST SECURITIES. *Quære*, whether, upon principle, as between the life tenant and the remainderman of a testamentary trust estate the life tenant can properly be charged with the premium, or with the loss occasioned by the wearing away of the premium, upon government securities in which the estate is invested.

6. STOCK DIVIDENDS. When a stock dividend declared by a corporation and allotted to shares of its original capital stock belonging to a testamentary trust estate, constitutes, as matter of fact, a distribution of accumulated earnings or profits, it represents income and belongs to the life tenant of the trust estate as between him and the remainderman.

7. ACCUMULATED EARNINGS ON CORPORATE STOCK. When questions arise under a will, between life tenant and remainderman, with respect to accumulated earnings upon capital stock of a corporation, the courts must determine them according to the nature and substance of the thing, and are not concluded from treating such earnings as income by the form of their distribution or by the terms employed by the corporation.

McLouth v. Hunt, 92 Hun, 607, affirmed.

(Argued October 7, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered January 25, 1896, which affirmed a judgment entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Pliny T. Sexton, Trustee, appellant in person. The certificate for twenty-five and four-tenths shares of the increased capital stock of the Western Union Telegraph Company, received therefrom in December, 1892, by the trustees under the will of Mrs. Cuyler, as their portion of said company's ten per cent stock dividend, simply constitute, together with the certificate previously held for 254 shares of the capital stock of said company, the evidence of the said trustees' title to the same relative interest in, or proportionate ownership of, said company, which, before said stock dividend, was equally and alone represented by said old certificate for 254 shares. Said stock dividend did not increase or alter the said trustees'

relative interest in, or proportionate ownership of, said company, or the character thereof. Such ownership, in its entirety, remains, as before, a part of the principal of the trust estates in the custody of said trustees, and said twenty-five and four-tenths shares of said company's increased capital stock are not income of said trust estates, and cannot lawfully be distributed as such to the current beneficiaries of such income, but must be retained for the remaindermen of said trust estates. (*In re Barton*, 4 Ves. 800; *Brander v. Brander*, L. R. [5 Eq. Cas.] 238; *Burrall v. B. R. R. Co.*, 75 N. Y. 211; *City of Utica v. Churchill*, 33 N. Y. 237; *Clapp v. Astor*, 2 Edw. Ch. 379; *Clarkson v. Clarkson*, 18 Barb. 646; *Daland v. Williams*, 101 Mass. 571; *In re Gerry*, 103 N. Y. 445; *Gibbons v. Mahon*, 136 U. S. 549; *Goldsmith v. Swift*, 25 Hun, 201; *Hiscock v. Lacy*, 9 Misc. Rep. 578; *Hite v. Hite*, 20 S. W. Rep. 778; *Hyatt v. Allen*, 56 N. Y. 553; *In re Kernochan*, 104 N. Y. 618; *Knight v. Lidford*, 3 Dem. 88; *Leland v. Hayden*, 102 Mass. 542; *People ex rel. v. Tax Comrs.*, 76 N. Y. 74; *Mills v. Britton*, 24 L. R. A. 537; *Minot v. Paine*, 99 Mass. 101; *Moss' Appeal*, 83 Penn. St. 264; 2 Perry on Trusts, § 545; *Prime's Estate*, N. Y. L. J. March 6, 1891; *Rand v. Hubbell*, 115 Mass. 461; *Riggs v. Cragg*, 26 Hun, 89; 89 N. Y. 487; *Simpson v. Moore*, 30 Barb. 637; *Spooner v. Phillips*, 16 L. R. A. 461; *Sproule v. Bouch*, L. R. [29 Ch. Div.] 635; *Thomas v. Gregg*, 28 Atl. Rep. 565; *People ex rel. v. Barker*, 86 Hun, 131; *Williams v. W. U. T. Co.* 93 N. Y. 189; *In re Woodruff*, 1 Tuck. 58.) The trustees are required by law to reserve and retain, as so much principal returned, such portion of the interest paid to them from time to time on the United States securities as will offset the proportionate current wearing away of the said premiums on said securities to the end that at the termination of said trusts at any time the full amount of the principal of said trust estates, as represented and invested in the said United States bonds turned over to or purchased by the said trustees, may duly remain undiminished by such wear of premiums. (*In re Albertson*, 113 N. Y. 435; *Bergen v. Valen-*

tine, 63 How. Pr. 221; *Burleigh v. Center*, 9 J. & S. 441; *Cogswell v. Cogswell*, 2 Edw. Ch. 230; *People ex rel. v. Davenport*, 30 Hun, 184; 117 N. Y. 549; *Farwell v. Tweddle*, 10 Abb. [N. C.] 94; *Fosdick v. Delafield*, 2 Redf. 392; *In re Gerry*, 10 Abb. [N. C.] 178; *Hardenberg v. Ray*, 151 U. S. 112; *Harvard College v. Amory*, 9 Pick. 461; *Hemenway v. Hemenway*, 134 Mass. 446; *Hite v. Hite*, 20 S. W. Rep. 778; *In re Housman*, 4 Dem. 415; *In re Hutchinson*, N. Y. L. J. Feb. 29, 1892; *In re Keteltas*, 1 Connolly, 468; *King v. Talbot*, 40 N. Y. 76; *Lovell v. Minott*, 20 Pick. 119; *In re Mason*, 98 N. Y. 534; *In re Shipman*, 82 Hun, 108; *Minott v. Thompson*, 106 Mass. 585; *N. E. T. Co. v. Eaton*, 140 Mass. 532; 1 Perry on Trusts, 537, 538; 2 Perry on Trusts, 85, 86; *In re Pollock*, 3 Redf. 100; *Pray v. Hegeman*, 92 N. Y. 508; Redfield's Surr. Pr. [5th ed.] 504; *Reynal v. Thebaud*, 3 Misc. Rep. 187; *Scovell v. Roosevelt*, 5 Redf. 121; *Shaw v. Cordis*, 143 Mass. 443; *Simpson v. Moore*, 30 Barb. 641; *Thurber v. Chambers*, 66 N. Y. 48; *Townsend v. U. S. T. Co.*, 3 Redf. 220; *Matter of Vowers*, 113 N. Y. 571; *Whitson v. Whitson*, 53 N. Y. 482; *Wilcox v. Quinby*, 26 N. Y. S. R. 114; *Woodward v. James*, 115 N. Y. 360.)

Charles McLouth, Trustee, respondent in person. The Western Union stock dividend should be regarded as income. (*In re Kernochan*, 104 N. Y. 618; *Riggs v. Cragg*, 89 N. Y. 487; 26 Hun, 90; *Clarkson v. Clarkson*, 18 Barb. 646; *Goldsmith v. Swift*, 25 Hun, 201; *Hyatt v. Allen*, 56 N. Y. 553; *Simpson v. Moore*, 30 Barb. 637; *Knight v. Ledford*, 3 Dem. 88; *In re Curtis*, 29 N. Y. S. R. 217; *In re Skillman*, 24 Abb. [N. C.] 41-44; Perry on Trusts [4th ed.], 545; *In re Lawrence*, 26 N. Y. S. R. 238; *In re Hodgman*, 140 N. Y. 421; *Cross v. L. I. L. & T. Co.*, 75 Hun, 533; *People ex rel. v. Davenport*, 30 Hun, 177; *Hite v. Hite*, 20 S. W. Rep. 778; *Earp's Appeal*, 28 Penn. St. 368; *Thomas v. Gregg*, 28 Atl. Rep. 565; *Sproule v. Bouch*, L. R. [29 Ch. Div.] 635; *In re Woodruff*, 1 Tuck. 58; *In re Warren*, 33 N. Y. S. R. 584; *Wood v. Lary*, 47 Hun, 550; *Whitson v. Whitson*,

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Points of counsel.

53 N. Y. 479; *In re Oliver*, 6 L. R. A. 421; *Spooner v. Phillips*, 16 L. R. A. 461; *Stuart v. Brown*, 11 App. Div. 494; *Hopper v. Sage*, 112 N. Y. 531-533; *People ex rel. v. Barker*, 86 Hun, 131.) The wear of premiums on the United States bonds should be borne by the *corpus* of the estate. (*White v. Hoyt*, 73 N. Y. 505; *Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247-254; *Stokes v. Muckay*, 140 N. Y. 649; *Trustees of E. Hampton v. Vail*, 151 N. Y. 463; *Stuart v. Brown*, 11 App. Div. 492; *In re Kernochan*, 104 N. Y. 627; *In re Clinton*, 12 App. Div. 132; *Stimson v. Vroman*, 99 N. Y. 79; *Niendorff v. M. R. Co.*, 150 N. Y. 276; *Hopkins v. Clark*, 149 N. Y. 329; Code Civ. Pro. §§ 190, 191; L. 1895, ch. 986, § 5; Const. N. Y. art. 6, § 9; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 219; *Crim v. Starkweather*, 136 N. Y. 635; *Amherst College v. Ritch*, 151 N. Y. 320; *Bergen v. Valentine*, 63 How. Pr. 221; *Shaw v. Cordis*, 143 Mass. 444; *Reynal v. Thebaud*, 3 Misc. Rep. 190; *Shulters v. Johnson*, 38 Barb. 80; *Stimson v. Vroman*, 99 N. Y. 74; *Freeman v. Coit*, 96 N. Y. 63; *Roseboom v. Roseboom*, 81 N. Y. 356; *Tilden v. Green*, 130 N. Y. 29; *Sturr v. Starr*, 132 N. Y. 154; *In re Gerry*, 103 N. Y. 449; *In re Lewis*, 3 Misc. Rep. 164; *Greer v. Chester*, 62 Hun, 329; *Burleigh v. Center*, 9 J. & S. 441; *Hemenway v. Hemenway*, 134 Mass. 446; *N. E. T. Co. v. Eaton*, 140 Mass. 532, 542, 543; *Knight v. Lidford*, 3 Dem. 90, 91; *In re Porter*, 5 Misc. Rep. 274; *Farrell v. Tweddle*, 10 Abb. [N. C.] 94; *Duclos v. Benner*, 62 Hun, 435; *Hite v. Hite*, 19 L. R. A. 173; *In re Jones*, 19 N. Y. S. R. 436.)

S. N. Sawyer for Carlton C. M. Hunt, respondent. Plaintiffs are not authorized or required by law to set aside and retain as a part of the *corpus* of the estate from the interest received upon the government bonds an amount sufficient to offset the wearing away of the market premiums. (Const. N. Y. art. 6, § 9; *Niendorff v. M. R. Co.*, 150 N. Y. 276; *Masterson v. Townshend*, 123 N. Y. 458; *Whitney v. Whitney*, 63 Hun, 59; *Woodward v. James*, 115 N. Y. 346; *Cahill*

v. *Russell*, 140 N. Y. 402; *Riggs v. Cragg*, 26 Hun, 95; *In re Lapham*, 37 Hun, 15; *In re Vowers*, 113 N. Y. 569; *In re McAlpine*, 126 N. Y. 290; *Simpson v. Moore*, 30 Barb. 637; *In re Gerry*, 103 N. Y. 445; *In re Pollock*, 3 Redf. 100; *Townsend v. Trust Co.*, 3 Redf. 220; *Scovell v. Roosevelt*, 5 Redf. 121; *Wilcox v. Quinby*, 73 Hun, 524; *Farrell v. Tweddle*, 10 Abb. [N. C.] 94; *People ex rel. v. Davenport*, 117 N. Y. 579; 30 Hun, 177; *Bergen v. Valentine*, 63 How. Pr. 221; *Reynal v. Thebaud*, 3 Misc. Rep. 187; *Shaw v. Cordis*, 143 Mass. 442.) The twenty-five and four-tenths shares of Western Union Telegraph stock received by the trustees for stock dividends are not properly a part of the *corpus* of the estate. They should be treated as income and distributed to these defendants. (*Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 Hun, 90; 89 N. Y. 487; *Hyatt v. Allen*, 56 N. Y. 553; *In re Kernochan*, 104 N. Y. 618; *Knight v. Bidford*, 3 Dem. 88; *In re Woodruff*, 1 Tuck. 58.)

William H. Shuart and Joseph A. Adlington for George C. Hunt et al., respondents. The stock dividend of twenty-five and four-tenths shares of stock of the Western Union Telegraph Company is income, and should be turned over to the beneficiaries now, and should not be retained as a part of the principal of the trust estate which they are not to receive until they respectively become thirty-five years of age. (*Riggs v. Cragg*, 89 N. Y. 487; 1 Cook on Stocks, etc., §§ 552-557; 1 Spelling on Priv. Corp. § 457; *Williams v. W. U. T. Co.*, 93 N. Y. 162; *Earp's Appeal*, 28 Penn. St. 374; *Moss' Appeal*, 83 Penn. St. 269; *Sproule v. Bouch*, L. R. [29 Ch. Div.] 639; *Hurd v. Eldridge*, 109 Mass. 260; *Hite v. Hite*, 93 Ky. 265; *Brander v. Brander*, 4 Vesey, 800; *Irving v. Houston*, 4 Paton Sc. App. 521; *Paris v. Paris*, 10 Vesey, 184; *In re Barton*, L. R. [5 Eq. Cas.] 238; *Minot v. Paine*, 99 Mass. 101; *Deland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461;

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Davis v. Jackson, 152 Mass. 58; *Gibbons v. Mahon*, 136 U. S. 549; *Thomas v. Gregg*, 78 Md. 545.) The loss, if any, from the wearing away of the premiums on United States bonds, should be borne by the *corpus* of the trust fund. (L. 1887, ch. 65; *Reynal v. Thebaud*, 3 Misc. Rep. 187; *Peckham v. Newton*, 15 R. I. 322; Redf. Surr. Pr. [5th ed.] 509; *Bergen v. Valentine*, 63 How. Pr. 221; *In re Pollock*, 3 Redf. 100; *Shaw v. Cordis*, 143 Mass. 446; *Hemenway v. Hemenway*, 134 Mass. 446; *Hite v. Hite*, 93 Ky. 257; *Whittemore v. Beekman*, 2 Dem. 276; *In re Furness*, 12 Phil. Rep. 130; *Meyer v. Simonson*, 5 DeG. & S. 723.)

O'BRIEN, J. This was an action to procure a judicial construction of the provisions of a will, and incidentally for an accounting by the trustees of a testamentary trust. Caroline Cuyler died on the 18th day of September, 1888, leaving a will with two codicils, which were admitted to probate. The plaintiffs are the executors of the will and trustees under the trust created thereby. The testatrix, after making various general and specific bequests and devises to collateral relatives, friends and institutions of charity, disposed of the residue of her estate in trust, for the benefit of three grandchildren named therein.

The questions involved here relate wholly to the administration of the trust by the trustees and to the distribution of the fund between the parties respectively entitled thereto. The trust provision is as follows:

"After the payment of the above legacies, and any debts which I may owe, and the proper expenses of settling my estate, all of the rest, residue and remainder of my estate of every kind, I give, devise and bequeath in three equal parts to my executors in and upon three several, separate and independent trusts, and in trust as follows, to-wit:

"That they take, receive, hold, care for, preserve, maintain, invest and re-invest, convert, sell, lease and collect the same in all things as in their discretion may seem advantageous for the benefit, respectively, of my said three grandsons, George Cuy-

ler Hunt, Samuel Hall Hunt and Carlton Charles McLouth Hunt, as follows:

"That my executors pay over to the use and benefit of each of my said grandsons, respectively, during their or his minority such portion of the income of said three parts for their support, maintenance or education as in the discretion of my executors may seem proper.

"That from and after the arrival at age of my said grandsons respectively, that my said executors pay over to each of them, respectively, annually from their arriving at age the full income of one of said three parts.

"That my executors pay over to each of my said grandsons, respectively, on his arriving at the age of thirty-five (35) years the full amount of one of said three parts, together with any accumulation thereupon which may remain.

"In case of the death of one of my said grandsons, prior to his arriving at the age of thirty-five (35) years, I direct that my executors shall pay over his share, being one of said three parts, to his descendants, if any. If none, then that the same shall remain in trust, as above written, for his surviving brothers, my two remaining grandsons.

"In case of the death of the second of my said grandsons, prior to his arriving at the age of thirty-five (35) years, I direct that my executors shall pay over his share, being one of said three parts, to his descendants, if any. If none, then his original part or third, as above written, shall remain in trust, as above written, for his remaining brother, my surviving grandson, but the portion or share so received or inherited by said second of my grandsons dying from the share of his prior deceased brother shall be paid to such surviving brother, my remaining grandson."

The executors and trustees duly qualified and took charge of the whole estate. On December 1, 1890, the surrogate having jurisdiction, by an order made on that day, directed the trustees to set aside and retain, for the purposes of the trusts, certain personal property belonging to the estate, including \$95,000, par value, of United States six per cent

bonds, valued at a premium of 28 per cent, or at \$121,600. Also \$12,000, par value, of United States four per cent bonds, at the same premium, inventoried and valued at \$15,360. The six per cent bonds will mature in 1898 and the four per cent bonds in 1907. There was also included in the trust, under the same directions, 254 shares of the capital stock of the Western Union Telegraph Company, upon which the trustees received a stock dividend of ten per cent on the 10th day of November, 1892, represented by certificates issued to them for twenty-five and four-tenths additional shares. This dividend was declared upon the surplus earnings of the corporation.

It appears that in the administration of this trust a difference of opinion arose between the two trustees with respect to their duties, and with respect to the distribution of certain items claimed by the one to be income and by the other to be capital. It was for the purpose of adjusting this dispute in an amicable spirit that this action was brought to obtain a construction of the will and a direction to the trustees with respect to their duties and obligations. The trustees are the sole plaintiffs, and the three grandchildren named in the trust provisions the only defendants. The defendants answered the complaint, setting forth what they claimed to be their rights under the will and the duties of the trustees with respect to the trust estate. The action being at issue it was referred to a referee for trial, and as an incident of the litigation a full accounting on the part of the trustees was had, which shows the sums paid out under the directions of the trust and the fund which still remains in their hands.

It will be seen from the terms of the will creating the trust in question that there is a contingent remainder in favor of descendants or great grandchildren born before the grandchildren arrived at the age of thirty-five years; but in case the latter arrived at that age without children, then they are to take the whole *corpus* of the estate. The grandchildren are now all living without children, and one of them is within a few months of the age specified. The other two will arrive at that age within the next four years. So that the only practi-

cal importance of this controversy, aside from the interesting nature of the questions involved, arises from the possibility that children may be born to some of them before they have reached the age designated in the will for the final termination of the trust and the distribution of the fund. The grandchildren, as the immediate beneficiaries of the trust, are entirely satisfied with the decision of the questions as rendered by the courts below, and none of them have appealed from the judgment. In case the grandchildren had now arrived at the age designated in the will without issue when they are to become the absolute owners of the whole fund, the case would present little more than an academical question, in which the trustees had no legal interest sufficient to warrant an appeal to this court. (*Bryant v. Thompson*, 128 N. Y. 426.) But as there is still a possibility that the contingencies contemplated by the will upon which the remainders to the immediate beneficiaries may be defeated, will happen, the questions raised must be met and decided.

In discussing these questions it will be more convenient to consider the grandchildren, before reaching the age of thirty-five, as life tenants, and after arriving at that age as remaindermen, although such a classification may not be strictly accurate. The case is obviously governed by the same rules and principles that prevail in the determination of legal questions between the owner of an estate for life and the owner of an estate in the same property in remainder, and the analogy is so perfect that we may adopt it in order to avoid confusion of terms and to bring the discussion within the language of the authorities cited, and which are conceded to have more or less application to the case. We have seen that the controversy is wholly between the plaintiffs themselves as trustees. Their respective claims and contentions are as follows :

Mr. Sexton, one of the trustees, contends :

(1) That in the administration and distribution of the trust estate the life tenants are not entitled to the full interest on the United States bonds, but that there should be deducted therefrom and retained by the trustees for investment a pro-

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gressively increasing sum in each year to meet what is called the wearing away of the premium, to the end that the remaindermen may receive them at the termination of the trust intact, without diminution in value in consequence of the fact that they have matured or are approaching maturity, when, of course, the premium must disappear altogether. In other words, that the expense of the premiums on the United States bonds must be borne by the life tenants and not by the tenants in remainder.

(2) That the stock dividends upon the Western Union stock was not income payable to the life tenants, but an accession to the capital which goes to the remaindermen.

Mr. McLouth, one of the trustees, and the three grandchildren defendants, on the other hand, insist upon just the contrary of these two propositions, and in their contention they have been sustained by the courts below.

At least one, if not both of these questions, have been the subject of discussion in the courts of this country and England for a century. The decisions, though numerous, are singularly conflicting and unsatisfactory. It is not necessary in the disposition of this case to review them or to attempt to reconcile the conflict, even if that were possible. The whole subject has been in recent years carefully examined and elaborately discussed in the courts of this country, and, while the conflict still exists, it is possible, from a study of the decisions and a careful consideration of the peculiar facts and circumstances of this case, to arrive at a conclusion which will be equitable and just and will have the support substantially of the more recent authorities upon the questions, as expressed in judicial decisions and by text writers.

Notwithstanding the conflict of authority to which I have just referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement, and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the rela-

tions of the parties to each other, their condition and all the surrounding facts and circumstances of the case.

With respect to the question as to which estate the premium upon the bonds is to be charged, the courts below have disposed of that by an application of this rule, and, in reviewing their decision, it is important to keep in view some facts as to which there is no dispute, viz. :

(1) That the bonds in question, except \$5,000, were purchased by the testatrix during her lifetime, or came to her by will, and were transmitted as she held them to the plaintiffs.

(2) That the direction in the will is that the life tenants shall receive the full income.

(3) That the trustees placed and retained these bonds in the trust as a part of the capital of the fund by the direction of the surrogate who had jurisdiction, a direction which they were not at liberty to disobey any more than if the testatrix herself had specifically designated them as a part of the trust fund. Upon a consideration of all the circumstances of the case, the learned referee held that it was the intention of the testatrix, in making the trust provision, that the decrease in the value of the securities by the lessening or wearing away of premiums on account of the bonds reaching maturity, should be borne by the *corpus* of the estate, and not presently by the defendants, and that the defendants were entitled to receive the whole of the current annual income of the estate, less expenses and commissions, as provided by the surrogate's decree under which the trust was erected.

It is said that the intention of the testatrix, with respect to the amounts which the beneficiaries were to receive as income from the earnings of the fund and expressed by the words "full income," was a question of fact to be determined not only from the language employed, but from the conditions and relations of the parties and all the circumstances of the case. Whether that is so or not, we think that when the testatrix directed that her grandchildren should receive the whole income of these securities she must have intended the full interest payable thereon, without diminution by reserv-

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ing a considerable portion of it for the purpose of meeting any depreciation in the market value of the bonds due to the fact that they were approaching maturity. Whatever meaning the words "full income" may convey to the mind of a trained expert in finance, it cannot, we think, be doubted that the common mind must always understand such a direction in a will as meaning the annual interest upon securities. To give to her words now an artificial meaning, based even upon scientific theories, would be to subvert her intentions and to take from the objects of her bounty a considerable portion of the money which she intended that they should receive. The thought that was in the mind of the testatrix with respect to her grandchildren, and the provision necessary for their support and maintenance, should be carried out. There seems to be no reason to believe that she intended that they should receive any less than the interest.

But quite apart from these considerations, it is said that upon principle and the great weight of authority, the decision of the learned referee was right. Since the investment must be unquestionably safe in order to preserve the capital as well as to secure income, the premium is paid for the benefit of the remainderman as well as the life tenant. The absolute security of government bonds, both to the life tenant and the remainderman, must always be kept in view. They may be purchased at a premium and sold at a still higher one, in which case, if there is a deduction made from the interest and added to the principal to balance the premium, the remainderman will be doubly benefited. Some investments will increase, while others will diminish in value. When all things are considered, the better rule, it is urged, is to allow these matters to balance themselves, as, on the whole, they are quite likely to in the end. The arguments against charging the life tenant in such cases with the premiums have thus been elaborated at great length in many of the adjudged cases. (*Hite v. Hite*, 93 Ky. 257; *Peckham v. Newton*, 15 R. I. 322; 33 Albany Law Journal, 424; *Bergen v. Valentine*, 63 How. Pr. 221; *In re Pollock*, 3 Redf. 100, 118;

Shaw v. Cordis, 143 Mass. 443; *Hemenway v. Hemenway*, 134 Mass. 446; *Whittemore v. Beekman*, 2 Dem. 276; *Furness's Estate*, 12 Phila. R. 130; *Meyer v. Simonsen*, 5 De Gex & Smale, 723.)

The authorities cited in support of the appeal on this point and which it is claimed establish the contrary rule are: *Farwell v. Troedde* (10 Abb. N. C. 94); *People ex rel. Cornell University v. Davenport* (30 Hun, 177; reversed, 117 N. Y. 549); *New England Trust Co. v. Eaton* (140 Mass. 532); *Reynal v. Thebaud* (3 Misc. Rep. 187); *N. Y. Life Ins. & T. Co. v. Kane* (17 App. Div. 542). We think the court below properly held that the premium upon the bonds could not be charged to the life tenants. Without attempting to show upon which side of the controversy the weight of reason and authority is, the intention of the testatrix as expressed in the will must prevail.

There were \$5,000 of the United States bonds purchased by the trustees after the erection of the trust at the same premium. There may be reasons for charging the life tenants with the premium on these bonds that do not apply to the others. But that item is so insignificant that it does not play any part in the controversy. All questions as to the premiums on these bonds were virtually waived on the argument, and we decide nothing as to which party, the life tenant or remainderman, should bear the loss occasioned by the wearing away of the premium. It was admitted at the argument that the parties themselves could adjust that part of the controversy.

With respect to the stock dividends upon the stock of the Western Union Telegraph Company, embraced in the trust, it is important to notice the finding of the referee. For the purposes of the case the parties stipulated, and the referee found, that in the fall of 1892 the Western Union Telegraph Company, by a capitalization of accumulated earnings made and retained in its hands, from time to time, increased its capital stock from \$86,200,000 to \$100,000,000, and predicated thereon made a stock dividend of ten per cent to its stock-

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holders, under which the plaintiffs received in December of that year from the corporation a certificate for twenty-five and four-tenths additional shares of stock, making, with the 254 shares previously held by them, 279 4-10 shares.

There is doubtless much stronger and more weighty authority to support the contention of the appellant with respect to this question than the one just considered. We will not attempt any extended or critical analysis of the numerous cases in which the question whether such a dividend is to be treated as capital or income has been discussed and decided. It would enlarge the scope of the discussion beyond all reasonable limits, and in the end answer no useful purpose. It is quite sufficient to say that they are in hopeless conflict, though, as it seems to us, the general trend of the more recent ones, as well as the weight of argument and reason, sustain the decision in this case. With respect to this question the appeal is sought to be sustained, first, by a class of cases in England founded upon *Brander v. Brander* (4 Vesey, 800), and followed by *Irving v. Houstoun* (4 Paton Sch. Ap. 521); *Paris v. Paris* (10 Vesey, 184), and *In re Barton* (L. R. [5 Equity Cases], 238).

Apart from the evident inclination of the judicial mind at that day in that country to favor entails, perpetuities and accumulations of property, it can hardly be said that these cases were well considered. Lord Chancellor ELDON admitted this in *Paris v. Paris* (*supra*), where he said: "I confess I do not think I can safely rest upon any distinction between this case and those that have been determined. I have had great difficulty in stating the principle that led to them. But in the case from Scotland great inquiry was made as to the length to which practice had carried the decisions here and at the rolls; and, as it appeared that it had gone to great length, the house of lords did not think it proper to disturb them." Then proceeding to notice the argument now made in this case, that there is a distinction between stock and cash dividends, he disposed of that contention with a homely but expressive remark. He said: "As to the distinction between stock and money, that is too thin; and if the law is, that this extraordi-

nary profit, if given in the shape of stock, shall be considered capital, it must be capital if given as money."

The rule as thus established in England was followed in Massachusetts, more as one of convenience than of justice, in a line of cases that are not quite consistent with each other. (*Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Heard v. Eldredge*, 109 Mass. 258; *Rand v. Hubbell*, 115 Mass. 461; *Davis v. Jackson*, 152 Mass. 58.) The rule was adopted there mainly upon the authority of the early English cases to which reference has been made.

The Supreme Court of the United States laid down the same rule in *Gibbons v. Mahon* (136 U. S. 549), evidently following the doctrine of the English and Massachusetts cases. Mr. Justice GRAY, who delivered the opinion, was a member of the Supreme Court of Massachusetts when the rule was established in that state. It cannot be doubted that these cases are authority in support of the appellant's contention, and yet, notwithstanding the exalted character of the courts from which they proceed, they are not binding upon us, except in so far as they appear to be founded upon reason and justice. We have recently had occasion to declare the extent to which we are bound by the decisions of even such a great tribunal as the Supreme Court of the United States, and the weight to be given to its judgments upon such questions of general law as we are now considering. (*Bath Gas Light Co. v. Claffy*, 151 N. Y. 24.) Moreover, it is by no means clear that the decision in this case is in conflict with the case of *Gibbons v. Mahon* (*supra.*) The rule for the determination of the question whether stock dividends were to be treated as income or an apportionment of capital, was stated by the learned justice in the following language: "When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution." In this

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case the resolution recites that the earnings of the corporation had been withheld from the shareholders for almost ten years ; that they had accumulated, and that it was the intention of the directors in taking such action, and the shareholders in consenting to it, to distribute such accumulated earnings to the shareholders in the form of stock certificates instead of money. It was, therefore, the substance and intent of the corporate action to distribute earnings rather than apportion additional capital. There was, in fact, no additional capital added. The capital of a corporation is the money or property that it has after deducting its debts. The Western Union Telegraph Company had no more property after passing this resolution than it had before, and, hence, no more capital. When the resolution was carried out it had, indeed, more capital stock outstanding, as represented by certificates, but not a single dollar had been added to its capital. It had nothing after passing the resolution that it did not have before. So that, within the rule stated by the learned justice, what the shareholder got in this case represented income and was income. When the substance of the transaction is analyzed, it will be seen that what the corporation really did was to issue to the shareholders its own obligations in the form of stock certificates against the accumulated earnings which it had on hand, and these certificates having a market value could readily be converted into money by the shareholders. So that the transaction was, in substance, a distribution of profits.

In *Riggs v. Cragg* (89 N. Y. 487) it was said by Chief Judge ANDREWS: "The right to stock dividends as between tenant for life and remainderman, has not been considered by the court of last resort in this state. The decisions upon the subject in other states and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates." This statement, with respect to the attitude of this court upon the question, was doubtless correct. But since this

utterance was made, cases have been decided in this court which it will be found exceedingly difficult to reconcile with the doctrine of the early English cases and those of Massachusetts. (*In re Kernochan*, 104 N. Y. 618; *In re Gerry*, 103 N. Y. 451; *Monson v. N. Y. Sec. and Tr. Co.*, 140 N. Y. 498; *In re Dewey*, 153 N. Y. 63.)

In so far as this court has touched the question at all since the decision in *Riggs v. Cragg*, nothing certainly can be found in the cases to sustain the contention of the appellant. The question had, however, been passed upon in the Supreme Court, upon full consideration, and the doctrine of the English cases and those of Massachusetts had been repudiated. (*Clarkson v. Clarkson*, 18 Barb. 646; *Riggs v. Cragg*, 26 Hun, 90; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201.)

The same may be said with respect to the action of the Supreme Court of Pennsylvania, where it has been held that a stock dividend represented income, and belonged to the life tenant. (*Earp's Appeal*, 28 Pa. St. 368; *Moss' Appeal*, 83 Pa. St. 264.) In the latter case it was said: "Where a corporation having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stocks or moneys, to whomsoever was entitled to the profits." The same rule was declared in New Jersey and New Hampshire. (*Van Doren v. Olden*, 19 N. J. Eq. 176; *Lord v. Brooks*, 52 N. H. 72.) There are other cases in these states to the same effect, but it is not necessary to refer to them. It is sufficient to say that in all of them the court refused to follow what is called the English and Massachusetts doctrine, for reasons that are stated at length, and which seem to be of great if not convincing force.

There are three very recent cases where the whole question has been carefully examined and the leading authorities critically reviewed by the highest courts in other states.

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These cases are *Hite v. Hite* (93 Ky. 257 [1892]); *Thomas v. Gregg* (78 Md. 545 [1894]); *Pritchitt v. Nashville Trust Co.* (96 Tenn. 472 [1896]). In each of these cases the court was entirely unembarrassed by any previous impressions or decisions. The question was new, and from the conflict of authority in other jurisdictions the courts, with admirable judgment and discrimination, proceeded to determine the question upon principle. It was held in each case that stock dividends, such as the one now under consideration, represented income, and in justice and equity properly belonged to the life tenant.

The reasoning of these cases seems to us far more cogent and persuasive than anything to be found in the cases which favor the contrary rule that a stock dividend, such as was made to the trustees in this case, is an apportionment of capital and not income. It is impossible to read the English cases without being impressed with the statement of the judges, so often repeated, that they found great difficulty in formulating any principle upon which the decisions rested. An attempt to give a reason for the rule was made in one of the more recent cases, but without much success. (*Sproule v. Bouch*, L. R. [29 Ch. Div.] 638-653.) It was all summed up in the end by the court in a single sentence: "What the company says is income shall be income, and what it says is capital shall be capital." This is but another way of saying that whether accumulated earnings belong to the life tenant or the remainderman, depends upon the action of the corporation, and that the property rights of such parties under the will are governed by the mere form of capitalization; that the majority of a board of directors may give them to one or the other at their will. While such a rule might have the merit of simplicity and convenience, it ought not to determine the property rights of parties interested in the corporate property.

That a testamentary provision of this character, for the benefit of both the life tenant and the remainderman, who are generally the nearest and dearest objects of the testator's bounty, can in this way be voted up or down, increased or diminished, as the corporation may elect, and that such action

precludes the courts from looking into the real nature and substance of the transaction, and adjusting the rights of the parties according to justice and equity, is a proposition that cannot be accepted. The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman.

When questions arise under a will between parties standing in such relations to each other, with respect to the right to accumulated earnings upon capital stock, the courts must determine the questions for themselves, according to the nature and substance of the thing which the corporation has assumed to transfer from the one to the other, and they are not concluded by mere names or forms. For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter, but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted the action of the corporation will not conclude the courts.

The decision of the learned referee in awarding the stock dividend to the life tenants as earnings or income, and in refusing to charge them with the premium upon the bonds, or that part of it that has disappeared by the lapse of time, is equitable and just, and, we think, is supported by reason and authority.

The judgment should, therefore, be affirmed, with costs to all parties payable out of the income of the fund.

All concur.

Judgment affirmed.

CHARLES S. FAIRCHILD et al., as Executors of MARY A. EDSON, Deceased, Respondents, v. MARGARET B. EDSON, Individually, and as Executrix of MARMONT B. EDSON, Deceased, Impleaded, etc., Appellant, et al., Appellants and Respondents.

MARGARET B. EDSON, Individually, and as Executrix of MARMONT B. EDSON, Deceased, Appellant, v. JOHN A. BARTOW et al., Executors of MARY A. EDSON, Deceased, Appellants, Impleaded with WILLIAM R. HUNTINGTON et al., Respondents.

154	199
\$ 154	768

154	199
\$ 155	571

154	199
160	479

154	199
163	224

154	199
169	*562

154	199
172	*420

1. WILL — ATTEMPT TO CURE LEGACIES TO SOCIETIES INCAPABLE OF TAKING. A testamentary provision to the effect that if any institution or society named as legatee shall be unable to take by reason of want of incorporation or for any other cause, the legacy intended for it is bequeathed "absolutely" to its chief executive officer "to be by him applied to the uses and purposes of such institution or society," is void.

2. TRUST — UNLAWFUL SUSPENSION OF ABSOLUTE OWNERSHIP. Such a provision involves a trust creating an unlawful suspension of the absolute ownership of personal property not measured by lives.

3. INEFFECTUAL BEQUEST. Such a provision also involves a bequest to societies unincorporated or otherwise incapable of taking, which cannot be sustained.

4. CHARITABLE TRUST — INDEFINITE DESIGNATION OF BENEFICIARIES. A testatrix who died prior to the act of 1893 (Ch. 701) bequeathed her residuary estate to her executors, "to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living." *Held*, that the bequest was void for indefiniteness, being an attempt to create a trust which failed to designate the beneficiaries, as a class, with such certainty as to enable the court to execute the trust in case the executors and the person named therein had refused to do so or were dead.

5. ABSOLUTE BEQUEST OF INEFFECTUAL LEGACIES, TO EXECUTORS PERSONALLY. The will provided that in case any legacy "shall lapse, fail or for any cause not take effect, I give and bequeath the amount which shall lapse, fail or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely. and without limitation or restriction." *Held*, that this provision did not import a trust,

but constituted upon its face an absolute gift to the executors as individuals, and hence was valid.

6. SOCIETY OF ST. JOHNLAND. Chapter 562 of Laws of 1872, amending the charter of the Society of St. Johnland, a charitable society incorporated under chapter 319 of Laws of 1848, does not exempt the society from the general provision of the act of 1848 rendering charitable bequests void when made within two months of the testator's death.

7. RES ADJUDICATA. A judgment, in an action dealing with the validity of a will upon its face, adjudging that under a residuary clause the executors took as individual legatees certain legacies absolutely and without limit or restriction, is not a bar to an action by the legal representative of the next of kin, based upon that adjudication and invoking equity to deal with the legacies in the hands of the individual legatees, and insisting that by reason of extrinsic evidence a trust should be impressed thereon for the benefit of the representative of the next of kin.

8. APPEAL—QUESTION OF FACT. On appeal from a judgment of reversal, the Court of Appeals cannot review a decision of the Appellate Division upon a question of fact, if there was any evidence to support the conclusion of the Appellate Division.

9. SECRET TESTAMENTARY TRUST — PROMISE BY LEGATEE. An express promise in words, by a legatee, to carry out the wishes of the testator, is not requisite to impress a secret trust upon a legacy; an implied promise, through silent acquiescence and tacit consent, is sufficient.

10. SECRET TRUST IN CIRCUMVENTION OF L. 1848, CH. 319. A secret trust which has for its object the circumvention of the statute (L. 1848, ch. 319) rendering void legacies to charitable uses contained in wills executed less than two months before death, is void.

11. IMPOSITION OF TRUST IN FAVOR OF NEXT OF KIN. When a legacy is given upon a secret trust, having for its object the circumvention of the statute of 1848, equity will not permit the legatee to hold the legacy, but will declare a trust thereon in favor of the next of kin.

12. APPELLATE DIVISION — FINAL JUDGMENT ON REVERSAL, INSTEAD OF NEW TRIAL. Under the power possessed by the Appellate Division to grant to either party the judgment which the facts warrant, on review of a decision which does not state separately the facts found (Code Civ. Pro. § 1022), that court is not required to grant a new trial on reversing a judgment as to one of several parties, but may properly order final judgment against him when it is apparent that the facts were all disclosed and could not be changed on a new trial.

13. LEGACY AS TENANCY IN COMMON — SECRET TRUST — PROMISE BY ONE LEGATEE ONLY. When a bequest to executors personally and absolutely is not declared by the instrument to be in joint tenancy it must be deemed to be a tenancy in common (1 R. S. 727, § 44); and in case one of such legatees has by a promise, express or implied, to comply with the testator's wishes, impressed his share of the bequest with an unlawful and void secret trust, the shares of the other legatees are not affected thereby,

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where it does not appear that the promise was made for any one except the individual promisor, and no promise, express or implied, was made by the other legatees.

14. TRANSFER TO NEXT OF KIN, NOT BY INTESTACY BUT BY IMPOSITION OF TRUST. When the share of a legatee in a residuary bequest is impressed with a void secret trust, it is not thereby thrown into intestacy, but equity will lay hold of it in his hands and impress thereon a trust in favor of the next of kin.

Fairchild v. Edson, 77 Hun, 298, affirmed.

Edson v. Bartow, 10 App. Div. 104, modified.

(Argued October 12, 1897; decided November 23, 1897.)

THE first case of *Fairchild et al. v. Edson et al.* involves appeals from two orders and two judgments of the General Term of the Supreme Court in the first judicial department, entered respectively July 6, December 7, July 31, and December 24, 1894.

The action is brought by the executors of Mary A. Edson at the request of Marmont B. Edson, her brother and sole heir at law and next of kin, for a construction of Mrs. Edson's will and to determine the validity of certain clauses thereof and the second codicil thereto. Marmont Edson died during the pendency of the suit and it was revived in favor of his widow, Margaret B. Edson.

The will and three codicils of Miss Edson were all executed during the month of May, 1890 — the will on the second, the first codicil on the twenty-second, the second and third codicils on the twenty-seventh, and she died on the twenty-ninth. Her estate exceeded one million dollars.

After certain specific bequests she left one-third of her estate to her brother for life, with a power of appointment in him. The balance of the estate, about \$800,000, she gave to charity.

The clauses of the will under consideration, as slightly modified by the second codicil, are as follows:

"*Fourth.* If by reason of an error in name or description, a question shall arise as to any beneficiary intended by me to be named, whether in my will or in any codicil, I direct such question to be determined by my executors. If by reason of want

of incorporation, or for any other cause whatsoever, any society or institution named in my will or in any codicil shall be unable to take the legacy intended for it, I give and bequeath such legacy absolutely to the person who shall be president of such institution or society, if it has a president, and if not, to the person who shall be its treasurer, if it has a treasurer, and if not, to the person who shall be its chief executive officer, to be by him applied to the uses and purposes of such institution or society.

“*Fifth.* The rest, residue and remainder of my estate not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living.

“If for any reason any legacy or legacies left by my will or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect either in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely, and without limitation or restriction.”

The Special Term held in substance :

1st. That the legacies to corporations incorporated under the act of 1848 (Ch. 319, § 6) or to which the act is applicable, were void, as the will and second codicil were executed less than two months before the death of the testatrix.

2nd. That the provision which permitted the executors to determine the beneficiary in case of error, in name or description, is valid.

3rd. That the provision giving legacy of unincorporated society, or of society unable to take for any other cause, to its president, treasurer or other chief executive officer to the uses and purposes of such society, is valid.

4th. That the so-called "Huntington clause" is valid, which bequeathed the residue of the estate to the executors, to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York appointed by them with the approval of Rev. Dr. William R. Huntington, if living.

5th. That the bequest in the final residuary clause to the persons named as executors, personally and absolutely, without limitation or restriction, of all legacies lapsing or failing for any cause, is valid.

The judgment of the General Term which modifies that of the Special Term adjudges:

First. That the provision of the will bequeathing legacies in trust to the president or other officer of unincorporated institutions to be devoted to their purposes, is void. This reversed the Special Term.

Second. That the first sentence of subdivision fifth of the second codicil, reading as follows, is void: "*Fifth.* The rest, residue and remainder of my estate not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living." This also reversed the Special Term.

Third. That the provisions contained in the second sentence of subdivision fifth, reading as follows, are valid: "If for any reason any legacy or legacies left by my will or by any codicil, either pecuniary or residuary, shall lapse or fail, or from any cause not take effect either in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect, absolutely to the persons named as my executors. In the use of the same, I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely and without limitation or restriction." This affirmed the Special Term.

Fourth. It added to the list of the societies whose legacies were void under the act of 1848, the Society of St. Johnland, the Orphan House of the Holy Saviour, at Cooperstown, Otsego county, N. Y., and the New York Protestant Episcopal City Mission Society.

The second case of *Edson v. Bartow et al.* involves the appeal of Margaret B. Edson, individually and as executrix of the last will of Marmont B. Edson, deceased, from the judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 11, 1896, which affirmed in part and reversed in part the judgment of the Special Term dismissing the complaint.

This action is brought to establish a constructive trust claimed by the plaintiff to exist under the provisions of the will of Mary A. Edson, deceased, when taken in connection with certain extrinsic facts. The judgment of the Special Term found that no such trust existed and dismissed the complaint.

The judgment of the Appellate Division adjudged that as to John E. Parsons one-third of the residuary estate did not pass by the will to him, and that as to that one-third part of the estate Mary A. Edson died intestate, and Parsons, Fairchild and Bartow, as executors of the will of Mary A. Edson, were directed to pay over the said one-third to the next of kin of Mary A. Edson.

The judgment of the Special Term dismissing the complaint as to William R. Huntington, Charles S. Fairchild and John A. Bartow was affirmed, with some modification as to costs.

Treadwell Cleveland, Joseph H. Choate, Daniel L. Smith and Philip Sidney Dean for Margaret B. Edson, individually and as executrix, appellant in both cases. The following provision in the will, as modified by the second codicil: "The rest, residue and remainder of my estate, not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious,

benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living," is void because of uncertainty in designating the beneficiaries. (*Holland v. Alcock*, 108 N. Y. 312; *Read v. Williams*, 125 N. Y. 560; *Tilden v. Green*, 130 N. Y. 29; *People v. Powers*, 147 N. Y. 104; *Edson v. Bartow*, 10 App. Div. 104; *Levy v. Levy*, 33 N. Y. 97; *Fosdick v. Town of Hempstead*, 125 N. Y. 581; *Hope v. Brewer*, 136 N. Y. 126.) The following provision in the will, as modified by the second codicil, to wit: "If, for any reason, any legacy or legacies left by my will or by any codicil, either pecuniary or residuary, shall lapse or fail or for any cause not take effect either in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect absolutely, to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely and without limitation or restriction," creates a trust for the reason that it is clear from this provision, taken in connection with the whole will, that the testatrix did not intend that the legatees here named should have the beneficial enjoyment of the subject of this bequest, but did intend that the property should be devoted to charitable uses. (*Colton v. Colton*, 127 U. S. 300; *Knight v. Knight*, 3 Beav. 148; *Knight v. Boughton*, 11 C. & F. 513; *Malim v. Keighley*, 2 Ves. 333; *Phillips v. Phillips*, 112 N. Y. 197; *Briggs v. Penny*, 3 McN. & G. 546; *Harrison v. Harrison*, 2 Gratt. 1; *Warner v. Bates*, 98 Mass. 274; *Foose v. Whitmore*, 82 N. Y. 405; Hill on Trustees [4th ed.], 116; *Smith v. Bell*, 6 Pet. 68; *Willets v. Willets*, 103 N. Y. 650; 20 Abb. N. C. 471; *Riker v. Leo*, 133 N. Y. 519.) The trust thus created by the clause in question is invalid. (*O'Hara v. Dudley*, 95 N. Y. 403.) The following provision of the will: "If by reason of want of incorporation, or for any other cause whatsoever, any society or institution named in my will or in any codicil shall be

unable to take the legacy intended for it, I give and bequeath such legacy absolutely to the person who shall be president of such institution or society, if it has a president, and if not to the person who shall be its treasurer, if it has a treasurer, and if not to the person who shall be its chief executive officer, to be by him applied to the uses and purposes of such institution or society," is illegal and void. (*O'Hara v. Dudley*, 95 N. Y. 403; *Cottman v. Grace*, 112 N. Y. 299.) The legacy to the Society of St. Johnland is void, because the will was made within two months of the death of the testatrix. (L. 1848, ch. 319.) A trust *ex maleficio* is established by the provisions of the will in question and the extrinsic facts of the knowledge on the part of John E. Parsons before Miss Edson's death of the residuary bequest to him and his co-executors, and of the intention of Miss Edson to devote the subject of this bequest to the charitable uses set forth in her will, through the agency of said three legatees and of his silence after such knowledge. His silence amounted to an undertaking on his part that her intention should be effectuated. The charitable uses set forth by Miss Edson are illegal and the trust is, therefore, void, and there results a trust for the plaintiff as representing the next of kin of Miss Edson. (*O'Hara v. Dudley*, 95 N. Y. 403; *Amherst College v. Ritch*, 151 N. Y. 282; *Huguenin v. Baseley*, 14 Ves. 294.) The secret trust affects all the property in the hands of all the executors. (*Amherst College v. Ritch*, 151 N. Y. 282; *Moss v. Cooper*, 1 J. & H. 352; *King's Estate*, 21 L. R. [Ir.] 273; *Hooker v. Azford*, 33 Mich. 453; *Russell v. Jackson*, 10 Hare, 204; *Springett v. Jennings*, L. R. [10 Eq. Cas.] 488; L. R. [6 Ch. App.] 333.) The plea of *res adjudicata* is of no force. (*In re Keleman*, 126 N. Y. 73.)

James C. Carter for corporations, appellants and respondents, in both cases. The final clauses of the will and of the 5th article of the codicil make an absolute bequest of the amounts stated in them to Messrs. Parsons, Bartow and Fairchild, unattended by any trust. (*In re Keleman*, 126 N. Y.

73; *Phillips v. Phillips*, 112 N. Y. 205; *Riker v. St. Luke's Hospital*, 35 Hun, 512; 102 N. Y. 742; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63; 1 Jarman on Wills [5th Am. ed.], 685, 703; Perry on Trusts, § 115; *Webb v. Wools*, 2 Sim. [N. S.] 267; *In re Adams v. Kensington*, L. R. [27 Ch. Div.] 394; *Fox v. Fox*, 27 Beav. 30; *Green v. Green*, 3 Irish Eq. 90; *Briggs v. Penny*, 3 M. & G. 546.) The residuary clause contained in the will and 2d codicil as follows: "The rest, residue and remainder of my estate I give and bequeath to my executors, to be divided by them among such incorporated, religious, benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living," is valid. (Lewin on Trusts [3d ed.], 693; Perry on Trusts, § 248; 2 R. S. ch. 1, tit. 2, §§ 94-100.) There is no extrinsic fact admitted or proved which furnishes any evidence whatever of the existence of an unexpressed trust. (*In re Keleman*, 126 N. Y. 73; *Podmore v. Ganning*, 7 Sim. 644; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Chester v. Unwick*, 23 Beav. 407; *Lee v. Ferris*, 2 K. & J. 357; *Moss v. Cooper*, 4 L. T. [N. S.] 790; *Jones v. Bradley*, L. R. [3 Ch. App.] 363; *McCormack v. Grogan*, 4 H. of L. 82; *Boerbotham v. Dunnett*, L. R. [8 Ch. Div.] 430; *Lomax v. Ripley*, 3 Sm. & G. 48; *Edwards v. Pike*, 1 Eden, 267; *Brown v. Stallhous*, 1 Eden, 508.)

David B. Ogden and *Edward W. Shepard* for executors of *Mary A. Edson*, deceased, et al., appellants and respondents, in both cases. The General Term having decided that all the estate which was not otherwise validly disposed of by Miss Edson's will passed to the plaintiffs herein for their own use, it should have affirmed the Special Term judgment without modification. (*Riker v. Cornwell*, 113 N. Y. 115; *Bryant v. Thompson*, 128 N. Y. 426; *In re Manning*, 139 N. Y. 446; *In re Hodgman*, 140 N. Y. 421.) The testatrix intended that her brother Marmont should not, under any cir-

cumstances, receive more than one-third of her estate, and that that third should be held for him in trust for his life, with remainder over to his children, and she did not intend to die intestate as to any portion of her estate. (*In re Keleman*, 126 N. Y. 73.) The bequest to the executors, contained in the 2d paragraph of the 5th clause of the will and in the 2d codicil, is absolute and valid. (*Reeves v. Baker*, 18 Beav. 372; *Riker v. St. Luke's Hospital*, 35 Hun, 512; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63; 1 Jarman on Wills [5th Am. ed.], 685, 703; Perry on Trusts, 2 Sim. [N. S.] 267; *In re Adams v. Kensington*, L. R. [27 Ch. Div.] 409; *Fox v. Fox*, 2 Beav. 30; *Green v. Green*, 3 Irish Eq. 90; *Briggs v. Penny*, 3 M. & G. 546; *Lefoy v. Flood*, 4 Irish Ch. 1; *Sturges v. Paine*, 146 Mass. 354; *Lawrence v. Cooke*, 104 N. Y. 632; *Foose v. Whitmore*, 82 N. Y. 405.) The power given by the testatrix to her executors to divide her residuary estate among a specified class of religious, benevolent and charitable societies is valid. (*Power v. Cassidy*, 79 N. Y. 602; *Owens v. Miss. Soc.*, 14 N. Y. 380; *Dammert v. Osborn*, 140 N. Y. 43; *Hollis v. Drew Theo. Sem.*, 95 N. Y. 166; *Read v. Williams*, 125 N. Y. 560.) The Appellate Division, even if right in reversing the judgment in the second case, erred in not granting a new trial. (*Whitehead v. Kennedy*, 69 N. Y. 462; *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 578; *Griffin v. Marquardt*, 17 N. Y. 28; *Ehrichs v. De Mill*, 75 N. Y. 370; *Thomas v. N. Y. L. Ins. Co.*, 99 N. Y. 250; *Iselin v. Starin*, 144 N. Y. 453.) To sustain the action the plaintiff must show, *first*, that the executors took the property charged with a trust, either expressed on the face of the will or communicated to them by the testatrix and assented to by them; and, *second*, that the trust was for an illegal purpose. Secret trusts are not forbidden. (*In re Keleman*, 126 N. Y. 73; *Bedilian v. Seaton*, 3 Wall. Jr. 279; *McCormack v. Grogan*, 4 H. of L. 82; *Carter v. Green*, 3 K. & J. 591; *Smith v. Edwards*, 88 N. Y. 102; *Hone v. Van Schaick*, 7 Paige, 221; *Williams v. Fitch*, 18 N. Y. 546; *Spicer v. Spicer*, 16 Abb. Pr. 112;

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Moyer v. Moyer, 21 Hun, 67; *Gilman v. McArde*, 99 N. Y. 451.)

S. P. Nash for the Cathedral of St. John the Divine et al., appellants and respondents, in both cases. The judgment in the case of *Fairchild et al. v. Edson* should be affirmed. (*In re Keleman*, 126 N. Y. 73.) This judgment was *res adjudicata* in the case of *Edson v. Bartow et al.*, and the latter action should have been dismissed. (*Cromwell v. County of Sac*, 94 U. S. 351; *C. P. P. & M. Co. v. Walker*, 114 N. Y. 7; *Pray v. Hegeman*, 98 N. Y. 351; *Reich v. Cochran*, 151 N. Y. 122.) The decision of the Special Term, in the suit brought by the executors of Mary A. Edson's will, was an adjudication sustaining the validity of the gift to the persons named as executors, and was a complete bar to the second action. (*Cromwell v. County of Sac*, 94 U. S. 351; *Read v. Williams*, 125 N. Y. 560; *Bailey v. Briggs*, 56 N. Y. 407; *C. P. P. & M. Co. v. Walker*, 114 N. Y. 7; *Pray v. Hegeman*, 98 N. Y. 351; *Reich v. Cochran*, 151 N. Y. 122.)

BARTLETT, J. It has been deemed advisable to consider in one opinion the two cases presented by these appeals, although they were argued separately and involved very different questions.

The first action was brought by the executors of the will of Mary A. Edson, deceased, for the purpose of obtaining a judgment construing and determining the validity of certain provisions of her will and second codicil.

The court below held, upon the face of the will, the final residuary clause valid which bequeathed to the persons named as executors, personally and absolutely and without limitation or restriction, any legacy, either pecuniary or residuary, which had lapsed or failed, or for any cause had not taken effect in whole or in part.

The second action was instituted by the brother of the testatrix, as her sole heir at law and next of kin, to establish a constructive trust under the provisions of the will and second

codicil, taken in connection with certain extrinsic facts established, as it is claimed, at the trial.

The plaintiff in this latter action died since it was begun, and this appeal is prosecuted by his executrix in her representative capacity and individually.

The second action proceeds upon the assumption that the first was properly decided, as the theory upon which it rests is that the bequest to the individuals named as executors, personally, is valid on the face of the will, but that a court of equity, by reason of extrinsic facts, will lay hold of the legacy in the hands of the individual legatee and impress upon it a trust, in order to do justice in the premises.

We will now consider the appeal in the first action, which deals with the validity of the will upon its face. It seems to be practically conceded in the briefs submitted that the provision of the will giving the legacy of an unincorporated society, or of a society unable to take for any other cause, to its chief executive officer to its uses and purposes, is void.

Such an officer would take in trust, notwithstanding the fact that the testatrix bequeaths the legacy "absolutely," as she provides it is held "to be applied to the uses and purposes of such institution or society." This trust is within the condemnation of the statute as creating an unlawful suspension of the absolute ownership of personal property not measured by lives (*Cottman v. Grace*, 112 N. Y. 299), and also involves a bequest to societies unincorporated or otherwise incapable of taking, which cannot be sustained. (*O'Hara v. Dudley*, 95 N. Y. 403.)

This leaves two principal questions to be considered:

The first arises under the following provision of the will as modified by the second codicil, which was held valid by the Special Term and void by the General Term: "The rest, residue and remainder of my estate, not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them,

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with the approval of my friend, the Rev. Dr. William R. Huntington, if living.”

It is urged that the testatrix has sought to create a trust which is void for the reason that she has not designated her beneficiaries, as a class, with certainty.

It has been repeatedly held by this court that the class of beneficiaries should be so designated and determined that if the executors or trustees to whom the fund is given should die before the execution of the trust, the court could distribute the fund equally among the members of the class. (1 R. S. 734, § 100.)

The true test to be applied to this provision of the will is, could the court execute this trust if the executors and the Rev. Dr. Huntington had refused to do so, or were dead?

The beneficiaries are described to be “such incorporated religious, benevolent and charitable societies of the city of New York” as shall be appointed by the executors, with the approval of the Rev. Dr. Huntington, if living.

If the Supreme Court were called upon to ascertain the beneficiaries designated as objects of this trust, and to decree equal distribution of the fund to all of the class named, we are of the opinion it could refuse to proceed on the ground that it would be impracticable to make a complete list of the incorporated religious, benevolent and charitable societies of the city of New York.

If the bequest were confined to incorporated religious societies of all denominations it would call upon the court to perform a very difficult task, but add to the list the incorporated charitable and benevolent societies of every kind, unlimited by creed or other restriction, and the class becomes so indefinite and uncertain that the court would find it impossible to execute the trust.

The validity of this provision of the will we are now considering was argued before us with great learning and ability, reviewing the law prior to the Revised Statutes creating our present system of trust powers governing trusts of personal as well as real property, and urging that in *Prichard v.*

Thompson (95 N. Y. 76) and kindred cases the statute had been so strictly construed as to prevent the courts from ascertaining the intention of testators, and in cases where gifts were to very large classes of charities, resulted in defeating the scheme of the will in that regard on the ground that the bequest was indefinite as to the class sought to be designated.

We were also reminded that the evil had become such a public reproach that the legislature had intervened in a manner that affords only an imperfect remedy. (Laws 1893, ch. 701.)

The obvious answer to this argument is that, while it would be entitled to serious consideration when addressed to a body seeking to frame a statute creating trust powers, so as to carry out to a greater extent than under the present system the intention of testators, it must necessarily be without force in this court, where the invalidity of the provision under review, read in the light of existing statutes, is established by a number of cases which are carefully reasoned both on principle and authority. (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 103 N. Y. 312; *Read v. Williams*, 125 N. Y. 560; *Fosdick v. Town of Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 130 N. Y. 29; *People v. Powers*, 147 N. Y. 104.)

It is unnecessary to go over the facts of these cases in detail, or to consider the principles and authorities upon which they rest, as it would be mere repetition.

We agree with the learned General Term that this provision of the will is void for indefiniteness.

The second question to be considered arises under the following provision of the will and second codicil, viz.: "If, for any reason, any legacy or legacies left by my will, or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect, either in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however,

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no conditions, leaving the same to them personally and absolutely, and without limitation or restriction."

The Special and General Terms have sustained the validity of this clause, holding that the executors took thereunder as individuals an absolute gift of all the property of testatrix not validly disposed of by the will and codicils.

It is insisted by the respondents, in support of this provision, that it is impossible to raise any question of interpretation; that the language is so clear as to exclude all doubt; that to ascertain the meaning of the clause we have only to read it; that the testatrix anticipated that the intention to create a trust might be imputed to her, and added language which prevents such a construction.

It certainly seems reasonable to assume that, where the court is considering the face of the will only, and a testator has said in so many words that he did not intend to create a trust, a conclusion could not be reached that he did intend it.

This case is not to be distinguished from that of *In re Keleman* (126 N. Y. 73). The language of the codicil in that case was as follows: "Doubts having arisen as to the validity of the bequests made for charitable purposes in my said will, I hereby modify said will, dated February 18th, 1889, by making my friend Townsend Wandell my residuary legatee and devisee, and hereby request him to carry into effect my wishes with respect thereto, but this is not to be construed into an absolute direction on my part, but merely my desire."

Judge FINCH, in writing the opinion of the court, said: "We think it very clear that the bequest was absolute to the legatee, and not upon any trust at all. * * * She leaves him absolute owner, and free to do as he shall choose. She puts upon him no obligation, legal or equitable, but contents herself with the bare expression of a wish which she hopes will influence his free agency. And so the bequest was absolute, and, therefore, valid on the face of the will." (See, also, *Riker v. St. Luke's Hospital*, 35 Hun, 512; affirmed, 102 N. Y. 742; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.)

We have carefully considered the very able briefs of the appellants which refer us to numerous authorities in England and this country, where the language of the will has been held to be mandatory and to import a trust. Every will is, to a certain extent, *sui generis* , and the trend of modern authority is to assume that the testator means precisely what he says, and that he is entitled to have attributed to his language its plain and ordinary meaning. Judged by this rule, the final residuary clause in the will before us created no trust upon its face.

There is a further question to be considered.

The Special Term held that the legacies to certain corporations incorporated under the act of 1848 (Ch. 319), or to which that act is applicable, were void, as the will was executed less than two months before the death of the testatrix. The General Term added to the list of these corporations, as set forth in the judgment of the Special Term, the names of three other corporation legatees, viz., Society of St. Johnland, Orphan House of the Holy Saviour at Cooperstown, Otsego county, New York, and the New York Protestant Episcopal City Mission Society, their legacies having been upheld by the Special Term.

The Society of St. Johnland alone has appealed to this court. This society was organized under the Laws of 1848 (Ch. 319), but claims exemption under the provisions of Laws of 1872 (Ch. 562). This act authorized the society "to take, hold, transfer and convey, for the purposes of its incorporation, in addition to the property now held by it, all such other property, real and personal, as has heretofore been given, devised, bequeathed, subject to all provisions of law relating to devises and bequests by last will and testament, or conveyed to it, or may hereafter be given, devised, bequeathed or conveyed to it by any person or persons whomsoever," etc.

It is urged on behalf of this society that the act quoted exempts it from the provisions contained in the general act of 1848, rendering charitable bequests void when made within two months of the testator's death, and that unless such a meaning is given the statute is without purpose.

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The act is inartificially drawn, but it obviously permits this society to take and hold property without limit as to amount, subject to all provisions of law relating to devises and bequests by last will and testament. This qualifying clause was evidently inserted to prevent releasing the society from the restrictions contained in the general act of 1848.

It, therefore, follows that the legacy to the Society of St. Johnland is void.

The judgments and orders of the General Term modifying the judgment of the Special Term in the first action are affirmed, with costs to all parties appearing by separate attorneys in this court to be paid out of the estate.

We now come to the cross appeals in the second action brought to establish a constructive trust as to the property bequeathed personally and absolutely to the three persons named as executors in Miss Edson's will.

The Special Term dismissed the complaint as to all the persons named as executors and the Appellate Division affirmed as to two of them, but as to John E. Parsons adjudged that the one-third of the residuary estate given to him be paid to the next of kin of testatrix.

We are met at the threshold of this appeal by the suggestion that the judgment in the first action is a complete bar to this suit.

We agree with the reasoning contained in the opinion of the learned Appellate Division on this point, and hold that the judgment in the first action is not a bar. As already pointed out, the first action dealt with the validity of the will upon its face and adjudged that under the final residuary clause the legatees took as individuals their respective legacies absolutely and without limit or restriction. In the second case the plaintiff rests upon that adjudication as the foundation of her action and invokes the aid of a court of equity to deal with the legacies in the hands of the individual legatees, insisting that by reason of extrinsic evidence a trust should be impressed thereon for the benefit of the legal representative of the next of kin or heir at law.

The statement of this situation is a complete answer to the suggestion of *res adjudicata*.

Approaching the merits of this case, we find that Miss Edson prior to 1884 inherited a fortune of about twelve hundred thousand dollars, and in that year executed a will in which her brother was made her residuary legatee in the event she survived her sister.

In May, 1890, and during her last illness, she executed the will and second codicil now before the court — the will on the second day of that month, the first codicil on the twenty-second, the second and third codicils on the twenty-seventh, and she died on the twenty-ninth.

The main contention of the plaintiff is that the second codicil, which contains the last residuary clause as finally amended, was executed by the testatrix under the shadow of death and within two days of her decease; that she was then advised by her counsel that her new testamentary scheme to devote her estate largely to religion and charity was likely to fail as it was apparent that her survival for sixty days was impossible; that in order to avoid the provisions of the law in this regard, the final residuary clause was devised so that legacies to the societies resting under the inhibition of the general act of 1848 should be paid to them by the individual legatees who had assumed a secret trust to carry out the wishes of the testatrix to that effect. These assertions of the plaintiff are fully denied, and upon this issue the parties went to trial.

It is important to have a clear understanding as to the manner in which the question of fact is presented to this court and the limits of our power in the premises. The trial court dismissed the complaint as to the residuary legatees Parsons, Bartow and Fairchild. The Appellate Division affirmed this judgment as to the two latter and reversed it as to Mr. Parsons and ordered a final judgment against him.

The defendants insist that the facts are undisputed and that no question of fact is presented here; that there is only a question of law as to whether the facts show a promise on the part of Mr. Parsons.

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The Appellate Division state in their order that the reversal was on the law and the facts, and say in their opinion that they concluded, from all the facts, that when the will was executed Mr. Parsons did have an understanding with Miss Edson as to her wishes with regard to this property.

Whether there is a question of fact in a case is always a question of law depending possibly upon a conflict of evidence and possibly upon conflicting inferences which may be drawn from uncontradicted evidence. (*Otten v. Manhattan R. Co.*, 150 N. Y. 401; *S. S. N. Bank v. Sloan*, 135 N. Y. 388-4; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.)

In the case before us we have uncontradicted evidence from which conflicting inferences may be drawn. In *Otten v. Manhattan Ry. Co.* (150 N. Y. 400) Judge VANN states the rule governing this question.

"It is clear that we have no power to review a question of fact in a civil case and that our jurisdiction is limited both by the Constitution and the statute to questions of law. When the Appellate Division affirms unanimously upon the facts we cannot look into the record to see whether there was any evidence to sustain the findings, for the Constitution forbids it. When the Appellate Division reverses upon the facts there is no constitutional inhibition, and a question of law arises as to whether there was any evidence to support the view of that court. If it appears that there was any material and controverted question of fact, the decision thereof by the Appellate Division is final. We cannot now review a decision upon a question of fact when the judgment is of reversal any more than we formerly could when it was of affirmance, except that if there is no material question of fact appearing in the record we have jurisdiction to review, because in that case the Appellate Division would have had no jurisdiction to reverse."

It, therefore, comes to this, that if there was any evidence to support the conclusion of the Appellate Division as to Mr. Parsons, we are not at liberty to weigh it or review it, but the decision below is final and binding upon this court.

In view of the earnest insistence of the learned counsel for defendants that the conclusion of the Appellate Division in this regard is wholly unsupported by evidence, we have examined this record with the greatest care and reached the conclusion that there is evidence to sustain the decision below as to Mr. Parsons.

We quote the final residuary clause in this connection: "If for any reason any legacy or legacies left by my will, or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect, I give and bequeath the amount which shall lapse, fail or not take effect, absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely and without limit or restriction."

Considering the facts established at the trial it cannot be properly said that there was no evidence to sustain the conclusion of the Appellate Division to the effect that this residuary clause was a last effort, so far as Mr. Parsons was concerned, to aid his dying client in carrying out a testamentary scheme that was about to be defeated to a very large extent by her immediate death, and that he took his legacy resting under the implied promise to carry out her wishes. The express promise in words is not necessary — silent acquiescence and tacit consent have all the force and effect of a promise solemnly made in the presence of witnesses. (*O'Hara v. Dudley*, 95 N. Y. 412.)

The evidence certainly discloses a state of facts from which opposing inferences may be drawn.

The following are some of the facts: That Mr. Parsons was and long had been the legal adviser of the testatrix; that the will and codicils were prepared under his supervision; that he attended to the execution of this second codicil within forty-eight hours of his client's death with more than usual care, reading it to the testatrix and stopping at the end of each clause until she nodded assent; that shortly after her death

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the residuary legatees met at Mr. Parsons' office and joined in a deed of gift, with the approval of Rev. Dr. Huntington, which provided, among other things, for the payment of legacies to all the corporations named in the will and codicils that had lapsed for any cause; that Dr. Huntington testified that he paid regard to what he understood to be the wishes of Miss Edson, and learned what they were from the executors.

We have no power, as before stated, to weigh or review these facts, but decide that there was evidence to support the conclusion of the Appellate Division as to Mr. Parsons.

Starting out with this conclusion, based on the facts, the judgment against Mr. Parsons is sustainable on principle and authority. The effect of his agreement was to defeat the policy of the state as embodied in the general act of 1848, rendering void all legacies to charitable uses contained in wills executed less than two months before death.

It has long been considered in accordance with a sound public policy to guard against those improvident dispositions by last will and testament which are so often the result of a weakened mental condition, due to severe illness, and the fear that comes to many in the hour of death.

It needs no argument to demonstrate that a secret trust, having for its object the circumvention of this statute, is void.

This being so, a court of equity will not permit the legatee to hold his legacy, but declares a trust in favor of the heir at law and next of kin. This precise question has been so thoroughly considered, and the authorities reviewed at such length by this court in *O'Hara v. Dudley* (95 N. Y. 403) and *Amherst College v. Ritch* (151 N. Y. 282), that a discussion on this branch of the case will not be prolonged.

The point is made by one of defendants' counsel that the Appellate Division, even if right in reversing the judgment as to Mr. Parsons, erred in not granting a new trial.

Section 1022 of the Code of Civil Procedure, as amended in 1895, to take effect January 1st, 1896, reads as follows:

"§ 1022. The decision of the court or the report of a ref-

eree, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, or the court or referee. may file a decision stating concisely the grounds upon which the issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs, it must designate the party to whom the costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the Appellate Division of the Supreme Court shall review all questions of fact and of law, and may either modify or affirm the judgment, or order appealed from, award a new trial, *or grant to either party the judgment which the facts warrant.*"

The words "or grant to either party the judgment which the facts warrant" are new. It is urged by appellants that these words confer no new power, and that the question as to what were proper cases for the exercise of this jurisdiction was not changed by this amendment.

We are of opinion that the ordering of final judgment in this case against Mr. Parsons was justified by the condition of the record.

It is apparent that the facts were all disclosed, and on a new trial they could not have been changed.

The remaining question is whether the secret trust affects all the property in the hands of the three legatees under the residuary clause.

The Appellate Division held that the legatees took as tenants in common, and that the promise of one made in his behalf with the testatrix did not bind his co-tenants.

In *O'Hara v. Dudley* (95 N. Y. 410) Judge FINCH states that the legatees in that case took absolutely, but as joint tenants. At pages 412 and 413 the learned judge says: "So far

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then as McCue is concerned he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates, by asserting its necessity and promising faithfully to carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one."

In the case at bar it is conceded that there is no evidence establishing a promise made testatrix, either express or implied, by Bartow or Fairchild. The plaintiff's contention is that Bartow and Fairchild are bound by the implied promise made by Parsons. In order to escape the force of the distinction taken in *O'Hara v. Dudley*, between joint tenants and tenants in common, it is urged that this court in *Amherst College v. Ritch* (151 N. Y. 282) expressly eliminated in this state the distinction in this class of cases between a joint tenancy and a tenancy in common.

This criticism is inaccurate and the conclusion based thereon unwarranted. There is a very clear distinction between the case cited and the one at bar. In the *Amherst College* case the trial court found that Ritch and Vaughan for themselves and Mr. Bulkley promised the testator, Mr. Fayerweather, that if he would make them the residuary legatees they would do as he desired. The General Term held that the facts so found were amply supported by evidence; also, that there was an understanding between Bulkley and the testator that the estate should be disposed of as the latter desired. Under these peculiar circumstances we held that Bulkley, by accepting the gift, ratified the promise made in his name.

In the case at bar there is no evidence that the implied promise of Mr. Parsons was made for any one except himself. In the will and codicil now under consideration there was no declaration of joint tenancy between the residuary legatees, so under the statute it must be deemed a tenancy in common (1 R. S. 727, § 44) which applies to personal property as well as real estate. (*Matter of Kimberly*, 150 N. Y. 90.) It fol-

lows that there was no error in the Appellate Division affirming the dismissal of the complaint as to Bartow and Fairchild.

It is freely conceded throughout this case that Mr. Parsons' position has been an honorable one; that his sole object was to carry out the religious and charitable designs of his client, who was *in extremis*, and that he never proposed to hold the legacy in question for his own benefit in whole or in part.

All this goes without saying, but a court of equity will never permit a testamentary scheme, however meritorious in origin or object, to prevail when it is proved that the testatrix and her residuary legatee have entered into an agreement, express or implied, having for its object the evasion of the statute and the subversion of the public policy of the state.

In conclusion, we call attention to the form of judgment entered up in the Appellate Division, doubtless through inadvertence, as to the one-third of the estate bequeathed to Mr. Parsons.

It adjudges that it did not pass by Miss Edson's will "to the said John E. Parsons, and that as to the said one-third part of her residuary estate the said Mary A. Edson died intestate." It then directs the executors to pay over the amount to the next of kin.

We have already pointed out that under the judgment in the first action the legacy to Mr. Parsons did pass under the will and second codicil, and that the court, in the exercise of its equitable jurisdiction, lays hold of this one-third of the estate in the hands of Mr. Parsons, individually, as residuary legatee, and impresses thereon a trust in favor of the next of kin. There was no intestacy as to this portion of the estate.

The judgment of the Appellate Division should be modified so as to conform to these views, and, as modified, affirmed, with costs to all parties appearing by separate attorneys in this court to be paid out of the estate.

All concur.

Judgment accordingly.

JULIA BENOIT, an Infant, by PETER BENOIT, Guardian ad Litem, Respondent, *v.* THE TROY AND LANSINGBURGH RAILROAD COMPANY, Appellant.

1. DOMESTIC ANIMALS — VICIOUS PROPENSITY — SCIENTER — LIABILITY OF OWNER. The fact that a pair of ordinarily manageable and gentle horses on one occasion broke from their driver and ran away on a public street, through fright naturally following from the conduct of third parties, does not of itself constitute a vicious propensity: nor does knowledge thereof render their owner liable, in the absence of negligence, if he thereafter uses them and they again run away from the same cause, and injure another.

2. NEGLIGENCE — DRIVING HORSES — ERROR OF JUDGMENT. If the driver of horses, in exercising his best judgment in directing their course in the emergency arising from their commencing to run away, errs, it is an error of judgment only, and is not ground for an imputation of negligence.

Benoit v. Troy & L. R. R. Co., 9 App. Div. 622, reversed.

(Argued October 14, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 5, 1896, which affirmed (by a non-unanimous decision) a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion to set aside the verdict and for a new trial.

This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant. The plaintiff was injured by the running away of a team of horses belonging to defendant, driven by its servant upon a street in the city of Cohoes. The complaint alleged that the injuries were the result of a defective or insufficient means of control of the horses, or of the habit of running away — a habit then well known to defendant — or of the negligence of the driver.

Further facts appear in the opinion.

R. A. Parmenter for appellant. The runaway was not from habit or one caused by the viciousness of the animals, and, therefore, the defendant was not legally responsible to

the plaintiff for the resultant injury to her on the ground of negligence on its part. The accident was a mere casualty for which no person is legally responsible. (*Quinlan v. S. A. R. R. Co.*, 4 Daly, 487; *Gottwald v. Bernheimer*, 6 Daly, 212; *Gray v. Tompkins*, 40 N. Y. S. R. 546; *Unger v. F. S. S. & G. S. F. R. R. Co.*, 51 N. Y. 497; *Button v. Frink*, 51 Conn. 342; *Cotton v. Wood*, 8 C. B. [N. S.] 566; *Hammock v. White*, 11 C. B. [N. S.] 588; *Cox v. Brundage*, 13 C. B. [N. S.] 430; *Goodman v. Taylor*, 5 C. & P. 410; *Bigelow v. Reed*, 51 Me. 325.) The trial judge committed an error in refusing to instruct the jury that they had the power and the right to disregard the testimony of Peter Benoit by reason of his interest in the event of the action, although in no respect contradicted by any other witness. (*M. R. R. Co. v. M. R. Co.*, 11 Daly, 378; *Wohlfahrt v. Beckert*, 92 N. Y. 497; *Elwood v. W. U. T. Co.*, 45 N. Y. 549; *Kavanagh v. Wilson*, 70 N. Y. 179; *Gildersleeve v. Landon*, 73 N. Y. 610; *Kearney v. Mayor, etc.*, 92 N. Y. 621; *B. C. T. R. R. Co. v. Strong*, 75 N. Y. 591.)

J. F. Crawford for respondent. Without regard to whether these horses had or had not run away previously to the first runaway admitted by Ladrick, or whether on that or on the subsequent occasion when plaintiff was injured, these horses started to run with or without cause, and irrespective of any question as to the negligence of the driver, a clear case of negligence and liability of defendant for this injury is established by the evidence. (*Kitridge v. Elliot*, 16 N. H. 77; *Smith v. Pelah*, 2 Strange, 1264; *Burch v. Blackburn*, 4 C. & P. 297; *Arnold v. Norton*, 25 Conn. 92; *Keenan v. G. P. Co.*, 12 N. Y. S. R. 617; *Helmke v. Stetler*, 52 N. Y. S. R. 528; *Slattery v. Schwannecke*, 7 N. Y. S. R. 430; *Reed v. S. E. Co.*, 95 Ga. 108.) Defendant's driver was guilty of negligence in that having the horses within his control, so far as their direction was concerned, as they came down the street, on the occasion of this injury, he voluntarily surrendered it, and all further control over them by hauling them to the north

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sidewalk and dashing the fragile structure, on which he was riding, against the curbstone, where it was certain to be wrecked. (*Cadwell v. Arnheim*, 81 Hun, 39.)

ANDREWS, Ch. J. The case was submitted to the jury upon two main propositions: *First*, whether the horses had the vicious propensity to run away, known to the defendant, and, *second*, whether Ladrick, the driver, was negligent in the management of the horses after they commenced to run, in reining them over to the left side of the street and bringing the stoneboat to which they were attached into collision with the street curb, thereby wrenching the front plank of the stoneboat from its fastenings, and freeing the horses so as to permit them to run on their way across the canal bridge, dragging the pole and whiffletrees where they collided with the plaintiff, causing the injury in question. The court charged that if the jury should find either of these propositions in the affirmative, the plaintiff was entitled to a verdict. We are of opinion that neither of them was sustained by evidence, and that the exceptions taken by the defendant to their submission to the jury were well taken. The general principles which govern the liability of the owner of domestic animals for personal injury caused by them are well settled. The owner is not responsible for an injury to another, caused by kicking, biting or other vicious propensity of such animal, unless the dangerous character of the animal was known to the owner. Such knowledge may be brought home to him by proof of prior acts of a similar kind to that charged in the complaint committed by the animal of which the owner had notice, or it may be imputed from its known dangerous character, as in the case of a ferocious Siberian bloodhound, kept by the owner for the protection of his premises, but allowed to be at large. (*Vrooman v. Lawyer*, 13 John. 339; *Van Leuven v. Lyke*, 1 N. Y. 515; *Muller v. McKesson*, 73 id. 195; *Spring Co. v. Edgar*, 99 U. S. 645.) In the absence of such knowledge or notice, an injury caused by such animal gives no right of action, but when the vicious habit or charac-

ter of the animal becomes known to the owner, and he thereafter continues to keep the animal, he keeps it at his peril and renders himself liable for any subsequent injury to another caused by its viciousness. This doctrine is founded on principles of humanity and the solicitude of the law for the protection of human life. The cases are frequent where actions have been maintained for injuries resulting from the bite of dogs, the biting or kicking of horses, goring by bulls, or other animals. It was sought to apply the principle upon which these actions have been maintained, and to hold the owner to the same rule of responsibility in a case where the injury was caused by a collision with horses which had escaped from the control of their driver on a public street, and which on a prior occasion to the knowledge of the owner had run away. It is conceded that if the horses had run away for the first time on the occasion in question, there could be no recovery, because there would then be an absence of what is called *scienter*, or, in other words, of prior knowledge of the propensity of the horses to run away. But this element is claimed to have been furnished by proof that about ten days prior to the accident in question, the horses had run away under similar circumstances, while being driven by the same driver, of which fact the company had notice. There is a suggestion in the evidence of the father of the plaintiff that on another occasion, prior to the one last mentioned, the horses ran away. But it is plain from the evidence of *Ladrick*, the plaintiff's witness, that the occasion mentioned by *Benoit* was the same one mentioned by the other witnesses, and that the horses had run away but once before the time when the injury happened. It was submitted to the jury to find from the fact that the horses had run away on this prior occasion, that they had this vicious propensity, and the court charged that if they found that this propensity existed and was known to the defendant, the defendant thereafter used the horses at its peril. We think the rule laid down by the court on the trial extends beyond reasonable limits the liability of owners of horses, and imposes a burden not sanctioned by any case

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which has come to our notice. The use of horses is very general. That they may on an occasion escape from the control of their driver and run away is not an uncommon experience. Must the owner, after such an occasion, stop using them, except under the onerous burden of absolute liability, if they shall run away a second time and cause injury? It may be admitted, as suggested on the trial, that horses that have once run away are less safe thereafter. This may bear upon the degree of care which should be exercised by the owner in their management. But does it place the horses under the ban of the law and make the owner liable, in the absence of negligence, if he uses them thereafter, and they again run away and cause injury? It may very well be that horses may be so unmanageable that they cannot be driven in the public streets without manifest danger. If this was established in a particular case, we see no reason why their use by the owner, with knowledge of their vicious character, should not make him responsible for any consequent injury. But the horses which caused the injury in this case were eight or nine years old, had been driven for several years on street cars of the defendant, had been kind and gentle, and the only departure from their peaceable habit and behavior before the occasion in question was when they ran away about ten days before. The circumstances show that on the former occasion they started from fright, when passing along a street in which a large number of school boys were hallooing and throwing snowballs, and Ladrick, the driver, who was sitting on the sled or stoneboat to which the horses were attached, guided them towards the bridge, but his eyes becoming filled with mud and slush, he was unable to see an approaching vehicle, and the sled colliding with it, he was thrown off and the horses made their way to the barn and then stopped. There was nothing in this transaction which would indicate to a prudent man that the horses were of a vicious or unmanageable disposition, or that they could not be safely driven thereafter. On the second occasion when they ran away, which was the occasion in ques-

tion, they were going on a walk, passing the school house where fifty or sixty boys as before were engaged in shouting and throwing snowballs, one of which hit the off horse, which started to run and the other followed him. The striking of the stoneboat against the street curb detached the horses, and escaping from the driver they ran over the bridge towards the barn, and on the bridge the horses or the pole struck the plaintiff and severely injured her. For this unfortunate accident the defendant is not, we think, legally responsible within the principles of the cases which establish liability for the use or keeping of dangerous or vicious animals. The cause of the running away of the horses on both occasions was fright, naturally following from the conduct of third persons, for whose acts the defendant was not responsible, and the fact that defendant knew of the circumstances of the first runaway did not, we think, justify the submission to the jury of the question whether the horses were vicious or dangerous, or unsafe to be used in driving along the street.

The exception to the submission to the jury of the second proposition mentioned, namely, the question of the negligence of the driver in his management of the horses after they commenced to run, was also, as we have intimated, well taken. The alleged negligence is predicated upon the fact that he reined the horses from the right to the left-hand side of the street and thereby caused the stoneboat to strike the curb, breaking the fastenings which attached the horses and allowing them to get out of the control of Ladrack, the driver. It is possible that if Ladrack had kept the horses in the middle of the street the injury to the plaintiff would not have happened. But it is plain from the evidence that he was, in the emergency which existed, exercising his best judgment in directing the course of the horses, and if he erred it was an error of judgment only, and is not ground for an imputation of negligence.

The court was asked to charge that the jury had the right to disregard the testimony of Benoit, the plaintiff's father, by reason of his interest, although not contradicted by other witnesses. It appeared that he had brought an action, which was

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pending, for the loss of services of the plaintiff, founded on the same transaction. The court refused to charge this request, but charged that in weighing his testimony his relationship to the plaintiff could be considered by the jury, and they could give his testimony such consideration and weight as they should deem it under all the circumstances entitled to. It is not necessary to consider whether, in connection with the charge made, there was any error in the refusal to charge the request.

We think the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

LOUIS E. BOMEISLER, as Executor of SALVATORE CANTONI,
Deceased, Appellant, v. ELSA FORSTER, Respondent.

1. APPEAL — PRESUMPTION OF QUESTION OF LAW. Where, in an action tried by the court or a referee, the decision did not state separately the facts found (Code Civ. Pro. § 1022), whether the Appellate Division, upon its review, either reverses and orders a new trial, or grants a final judgment to either party, if its order is silent as to the grounds, section 1338 controls and requires the presumption that the reversal was upon a question of law.

2. SCOPE OF REVIEW BY COURT OF APPEALS. Upon appeal from an order and judgment of the Appellate Division, reversing a judgment in favor of the plaintiff and dismissing the complaint upon the merits, in an action tried by the court or a referee, where the decision did not state separately the facts found and the order of the Appellate Division is silent as to its grounds, the review by the Court of Appeals is confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the relief awarded him and, if there was no error in that respect, whether there were errors of law committed in the rulings upon the trial, which would, in any event, have justified a reversal of the judgment and rendered a new trial necessary.

3. EQUITY — RESTRAINT OF ACTION AT LAW. When a court of equity is asked to stay an action at law, it must consider whether, if it be a case where a legal defense to the action in fact exists, the applicant should be left to that as an adequate remedy, and whether any appreciable injury can result in denying him the right to establish the existence of some bar to the action at law and, thereupon, to have the same enjoined.

154	229
158	463
154	229
d163	47
f163	228
f163	507
e163	509
163	510
163	512
j163	522
154	229
f164	854
f164	877
154	229
j165	404
154	229
169	*205

4. **SPECIFIC PERFORMANCE OF PERSONAL CONTRACTS.** The extension of the rule of specific performance to personal contracts is justified, where there would not be a complete and satisfactory remedy by compensation in damages, or where the benefits of the contract would not inure fully to the party in whose favor it was made, unless it was specifically performed.

5. **RESTRAINT OF ACTION AT LAW IN DISREGARD OF CONTRACT OF SETTLEMENT.** When it appears in an action in equity brought to restrain the defendant from prosecuting an action at law in breach of a lawful contract between the parties, by which the defendant had released the claim upon which the action at law was brought and had agreed not to sue thereon, that a specific performance of the contract is essential, if the plaintiff is to receive its benefits, such as security from charges and revelations which might affect his reputation, an injunction may properly be granted.

6. **EVIDENCE CONFINED TO ISSUES ON TRIAL.** When the issues triable in an action in equity to restrain a pending action at law are whether the defendant had executed a release of the charges on which the action at law was based and had orally agreed not to sue on the same, and whether such release and agreement were invalidated by fraud, misrepresentation or duress, evidence bearing upon the charges made in the complaint in the action at law, or bearing upon obligations claimed to arise by reason of matters set up therein, being pertinent only to the issues in that action, is not admissible in the action in equity.

7. **ORAL EVIDENCE AS TO BASIS OF ORAL CONTRACT NOT TO SUE.** In an action in equity to restrain an action at law brought in contravention of an oral contract not to sue, sought to be avoided on the ground of fraud and duress, it is not error to permit the plaintiff to introduce oral evidence of propositions of settlement made on behalf of the defendant and which formed the basis of the contract.

Bomeisler v. Forster, 10 App. Div. 43, 626, reversed.

(Argued October 15, 1897; decided November 23, 1897.)

APPEAL from an order and judgment of the Appellate Division of the Supreme Court in the first judicial department, entered respectively November 20 and 24, 1896, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at a Special Term of the Superior Court of the city of New York, and directed judgment absolute for the defendant dismissing the complaint upon the merits.

The nature of the action and the facts, so far as material, are stated in the opinion.

Wm. B. Hornblower and *Louis E. Bomeisler* for appellant. The order of the Appellate Division reversing the judgment and the judgment entered thereon do not state that the reversal is made upon the facts. In order to sustain the reversal, therefore, it must be shown that an error of law was committed by the trial judge, and the disputed facts as found by him must be taken as correct. (Code Civ. Pro. § 1338; *Cudahy v. Rhinehart*, 133 N. Y. 248; *In re Laudy*, 148 N. Y. 403.) The Appellate Division erred in holding that there was an adequate remedy at law, and that the plaintiff was not entitled to equitable relief. (146 N. Y. 405; *Sanders v. Rodway*, 22 L. J. Ch. 230; *Phillips v. Berger*, 2 Barb. 608; *Carpenter v. Keating*, 10 Abb. Pr. [N. S.] 223; *Beach on Injunctions*, 567; *Baker v. Hawkins*, 14 R. I. 359; *Wright v. Fleming*, 76 N. Y. 517; *Deen v. Milne*, 113 N. Y. 303; *Waterman on Spec. Perf.* § 109; *D. M. Co. v. Roeber*, 106 N. Y. 473; *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157; *Joy v. Louis*, 138 U. S. 1; *Pom. on. Spec. Perf.* [2d ed.] § 25; *Withy v. Cottle*, 1 S. & S. 174.) Altogether aside from the remedy of specific performance of an agreement not to sue, equity will restrain a vexatious and harassing lawsuit brought in bad faith. (2 Story's Eq. Juris. [13th ed.] 211, § 901; *Dawkins v. Prince Edward*, L. R. [1 Q. B. Div.] 499; *Castro v. Murray*, L. R. [10 Ex.] 213; *N. & N. B. II. Co. v. Arnold*, 143 N. Y. 265; *Jacobs v. Raven*, 30 L. T. 366; *Bushby v. Munday*, 5 Madd. 297; *C. I. Co. v. Maclaren*, 5 Clark, 438; *Vail v. Knapp*, 49 Barb. 300; *Kittle v. Kittle*, 8 Daly, 72; *Claflin v. Hamlin*, 62 How. Pr. 284; *Field v. Holbrook*, 3 Abb. Pr. 377; *Keyser v. Rice*, 47 Md. 203; *Dehon v. Foster*, 4 Allen, 545.) Defendant ratified her said agreement and release by retaining the \$6,000 consideration therefor. Having elected to affirm the same she is now estopped from attacking it. (*Crans v. Hunter*, 28 N. Y. 389; *Pullman v. Alley*, 53 N. Y. 638; *Cobb v. Hatfield*, 46 N. Y. 533; *Lindsley v. Ferguson*, 49 N. Y. 623; *Schiffer v. Dietz*, 83 N. Y. 307; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 82; *Allerton v. Allerton*, 50 N. Y.

670; *Baird v. Mayor, etc.*, 96 N. Y. 598; *Strong v. Strong*, 102 N. Y. 69; *O. P. R. R. Co. v. Forrest*, 128 N. Y. 91; *Pryor v. Foster*, 130 N. Y. 171; *Tallinger v. Mandeville*, 113 N. Y. 427.) Equity favors compromise agreements and will enforce them whenever possible. (2 Cal. 197; 15 Johns. 197; 5 Cow. 387; 12 Wend. 508; 10 Barb. 333; *Vosburgh v. Teator*, 32 N. Y. 561; *Crans v. Hunter*, 28 N. Y. 389; 18 Wend. 407; 47 N. Y. 57; *Wehrum v. Kuhn*, 61 N. Y. 623; *Zane v. Zane*, 6 Mumf. 406; *Taylor v. Patrick*, 1 Bibb, 168; *Coved v. McKilvery*, Addis. 56; *Okeyson v. Barclay*, 2 Penn. 531; *Chamberlain v. McClurg*, 8 W. S. 831; *N. & N. B. H. Co. v. Arnold*, 143 N. Y. 269.) The defendant in a court of record is not bound to avail himself by way of counterclaim of an independent cause of action existing in his favor against plaintiff. The rule in this respect was not changed by the Code. (*Brown v. Gallaudet*, 80 N. Y. 417, 418; *Davidson v. Alfaro*, 80 N. Y. 662; *Gillespie v. Torrance*, 25 N. Y. 306; *Siemon v. Schurck*, 29 N. Y. 598; *Ruppert v. Haug*, 87 N. Y. 141; *Liquot v. Reading*, 4 E. D. Smith, 285; *Barth v. Burt*, 14 Abb. Pr. 349; *Halsey v. Carter*, 1 Duer, 667; *Welch v. Hazelton*, 14 How. Pr. 97; *Inslee v. Hampton*, 8 Hun, 230.) The ruling of the court was correct which permitted the witness Durant to testify to the oral agreement on the part of the defendant not to sue. (*Chapin v. Dobson*, 78 N. Y. 74; *Routledge v. Worthington Co.*, 119 N. Y. 592; 1 Greenl. on Ev. § 284; *Condit v. Cowdrey*, 123 N. Y. 463; *Thomas v. Scutt*, 127 N. Y. 133.) The Appellate Division erred in directing judgment absolute for the defendant instead of ordering a new trial, even if their decision reversing the judgment was correct in point of law. (*Thomas v. N. Y. L. Ins. Co.*, 99 N. Y. 250; *Ehrichs v. De Mill*, 75 N. Y. 370; *Guernsey v. Miller*, 80 N. Y. 181; *Iselin v. Starin*, 144 N. Y. 453; Code Civ. Pro. § 1317.)

Samuel H. Randall for respondent. The Appellate Division had ample power to either award a new trial or grant judgment absolute, dismissing the complaint upon the merits,

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Points of counsel.

with costs, and its action and judgment were not erroneous. (Code Civ. Pro. §§ 992, 993, 1022; L. 1894, ch. 688; *Billings v. Russell*, 101 N. Y. 226; *Cudahy v. Rhinehart*, 133 N. Y. 248; *Moran v. McLarty*, 75 N. Y. 25.) No error was committed by the Appellate Division in holding plaintiff was not entitled to any equitable relief and had an adequate remedy at law. (*McHenry v. Jewett*, 90 N. Y. 58; *Wallack v. Society, etc.*, 67 N. Y. 23; *People v. Wasson*, 64 N. Y. 170; *Wolfe v. Burke*, 56 N. Y. 115; *Savage v. Allen*, 54 N. Y. 458; *Stull v. Westfall*, 25 Hun, 1; *Plear Co. v. T. Co.*, 34 Fed. Rep. 357; *Freeman v. Carpenter*, 6 N. E. Rep. 305; *Woods Co. v. Stover*, 4 N. E. Rep. 219; *Mer. Nat. Bank v. Moulton*, 3 N. E. Rep. 734; *Oakville Co. v. D. P. T. Co.*, 105 N. Y. 658; *Jackson v. Bunnell*, 113 N. Y. 216.) The Appellate Division did not err in determining the plaintiff was not entitled to any judgment in this action. (Willard's Eq. Juris. [ed. 1889] 263; *Stevens v. Comstock*, 109 N. Y. 655; *Tiffin v. Shawhan*, 1 West. Rep. 55; *Herren v. Rich*, 95 N. C. 500; *Seymour v. Delancey*, 6 Johns. Ch. 222; *P. C. Co. v. D. & H. C. Co.*, 31 N. Y. 91; *Peters v. Delaplaine*, 49 N. Y. 362; *Hamilton v. Harvey*, 121 Ill. 469; *McComas v. Easley*, 21 Gratt. 23; *Murdfeldt v. N. Y., W. S. & B. R. Co.*, 102 N. Y. 703; *Eckstein v. Downing*, 4 N. E. Rep. 387.) A decree for a specific performance will not be granted upon uncorroborated evidence of the complainant, or of a single witness, when a defendant denies the making of the agreement sought to be enforced; and where one seeks to enforce a contract *not* in writing, the contract must be certain and definite in its terms and established upon clear and unequivocal evidence. (*McManigle v. McManigle*, 4 Cent. Rep. 408; *Stern v. Nysanger*, 69 Iowa, 512; *Magee v. McManus*, 70 Cal. 558; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Harris v. Knickerbacker*, 5 Wend. 638; *Losee v. Morey*, 57 Barb. 561; *Hinckley v. Smith*, 51 N. Y. 21; *Veth v. Gierth*, 92 Mo. 97; *Holhouse's Appeal*, 11 Cent. Rep. 157; Willard's Eq. Juris. 269; *Reppitti v. Marsuk*, 12 Cent. Rep. 411; *Shakespeare v. Markham*, 72 N. Y. 400.) There were no written agree-

ments proved upon the trial. (*Milliman v. R. R. Co.*, 3 App. Div. 109; *Byrne v. R. R. Co.*, 58 N. Y. S. R. 128; *Carpenter v. P. R. R. Co.*, 13 App. Div. 328-330; *Neuman v. Clapp*, N. Y. L. J. March 30, 1897.) Equity will withhold its aid if the agreement is unfair, unreasonable or unduly obtained or unconscionable, and where the consideration is grossly inadequate, and the probabilities must be taken into consideration in determining whether specific performance of an alleged contract will be decreed. (*Harrison v. Polar Star Lodge*, 3 West. Rep. 477; *Throckmorton v. Davidson*, 68 Iowa, 643; *Warren v. Hall*, 41 Hun, 466; *Kelly v. Kendall*, 6 West. Rep. 544; *Higgins v. Butler*, 3 N. E. Rep. 278; *Green v. Begol*, 14 West. Rep. 913; *Jones v. Babbitt*, 66 Barb. 611; *King v. Knapp*, 59 N. Y. 462; *Shakespeare v. Markham*, 72 N. Y. 400; *Livingston v. Peru I. Co.*, 2 Paige, 390; Willard's Eq. Juris. 263-266; *Seymour v. Delancy*, 3 Cow. 531.) There was no release or instrument of any kind produced at the trial whereby defendant covenanted or agreed she would not sue or bring any further action against plaintiff. (*Palmer v. Foley*, 71 N. Y. 129; *Mandeville v. Harman*, 5 Cent. Rep. 625.) It was error for the trial court to rule and to limit the evidence on defendant's part to the matters connected only with the execution of the release of May 21, 1892, and the papers dated June 2, 1892, and refuse to take testimony on the other issues in the action and those raised by defendant's answer, and to refuse to investigate the claims of defendant against plaintiff, which were alleged to have been the subject to which said release and papers related. (*Conro v. P. H. I. Co.*, 12 Barb. 61; *Rathbone v. Warren*, 10 Johns. 587; *Schiffer v. Lauterbach*, 7 App. Div. 223; *Otis v. Gregory*, 10 West. Rep. 792.) It was error for the trial court to rule that defendant could not avail herself of any fraud by plaintiff in obtaining the releases, and that the injunction order affirmed by the General Term was *res adjudicata* as to the merits of plaintiff's right to an injunction in the action and that defendant must stand by them, and her mouth should be closed and hands tied until she brought an action in equity

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to rescind. (Code Civ. Pro. §§ 603, 604; *Morgan v. Binghamton*, 3 Cent. Rep. 649; *Lift v. Dougherty*, 74 Ga. 340; *Balfe v. Lammis*, 7 West. Rep. 548; *Troxell v. Haynes*, 5 Daly, 389; *Goodman v. Lodge of B'nai B'rith*, 8 Cent. Rep. 278.)

GRAY, J. The plaintiff's testator sought in this action to obtain a decree, which should restrain the defendant from prosecuting an action at law then pending in the Superior Court of the city of New York, wherein she was the plaintiff and he was the defendant, or from bringing any other action for the same cause, and which should compel her specifically to perform her agreement not to harass the plaintiff by suits upon any claims of the nature of those described in her complaint.

It appears that prior to May 21st, 1892, the defendant had charged that Cantoni was the father of certain of her children; that he had promised to marry her and that they had lived together as man and wife; that he had promised to pay her sums of money and to make a substantial provision for her in case of his death and, also, that she had rendered services to him as his housekeeper for the period of about seven years. Upon claims of this nature she had threatened to sue him. On the date above mentioned, she executed an instrument, whereby she released Cantoni from all claims and demands that she had, or might have, against him and, particularly, from claims based upon her charge that he was the father of her children. A few days later, however, an action was commenced in her name against Cantoni to recover the sum of \$250,000, on substantially the same claims. Thereupon, and on June 2d, 1892, a further settlement was made between them and, at that time, after swearing, in the form of an affidavit, to the effect that her previous release was freely and consciously made; that her charges against Cantoni were false and that she had no claims against him, she orally agreed, in consideration of \$6,000, to discontinue the then pending action, to relinquish all claims she might have and

that she would "not thereafter in any manner communicate with, harass or annoy the plaintiff by suing him at law, or in equity, in person, by procurement or otherwise, by virtue of any claims she might have, etc." Two years later the action, which is now sought to be enjoined, was commenced by her, upon substantially the old claims, to recover damages in the sum of \$175,000.

The making of the release of May 21st, 1892, and of the agreement of June 2d, 1892, above mentioned, were decided to be proven by the trial judge. His decision was in the form of a concise statement of the grounds upon which the issues were decided (section 1022 of the Code), and, upon the issue made as to the validity of the release and agreement, he decided that they were upon a valuable consideration, voluntarily and intelligently entered into and not the result of any fraudulent practices or coercion. The decree of the court, at Special Term, awarded to the plaintiff the equitable relief demanded; but, upon appeal, the Appellate Division ordered its reversal and that judgment should be entered for the defendant, dismissing the complaint upon the merits.

The order is silent as to the grounds for the reversal, or upon which judgment is given for the defendant. Authority is conferred by section 1022 of the Code of Civil Procedure upon the Appellate Division to review all questions of fact and of law, upon an appeal from a judgment upon a decision, which does not state separately the facts found, and to grant to either party the judgment which the facts warrant. Where the Appellate Division, as here, upon reversing a judgment, grants a judgment upon the merits to the appealing party, it might seem as though the case came before this court, upon an appeal, upon its questions of fact as well as of law; despite the absence of any statement in the body of the order that the reversal and direction for judgment were upon the facts. But we are not disposed to believe that the legislature intended any exception to the provisions of section 1338; which require the presumption at our hands that a reversal was not upon a question of fact, unless the contrary clearly appears in

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the body of the judgment or order appealed from. That section and section 1338 have reference to trials before the court, or before a referee, and we do not think that we can enlarge our province of review beyond the limits set by section 1338. The grounds of the decision of the issues, which section 1022 authorizes to be concisely stated, as a substitute for separate findings of fact, must be regarded as containing statements of those facts, which the trial judge, or referee, deems to be established by the evidence and his decision has the support of the same presumptions, which go to the support of a general verdict. (*Amherst College v. Ritch*, 151 N. Y. 282.) A general exception to the decision imposes upon the Appellate Division the duty to review all the questions of fact and of law; and where it reverses and orders a new trial, or grants a final judgment, and its order is silent as to its grounds, we are bound to presume that it was made upon the questions of law presented by the case. Our review is, therefore, confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the equitable relief awarded him and, if there was no error in that respect, whether there were errors of law committed in the rulings upon the trial, which would, in any event, have justified a reversal of the judgment and rendered a new trial necessary.

Upon reference to the opinion of the Appellate Division, it appears that the learned justices thought that, as there was a perfect defense to the pending action at law, in the release which the defendant had executed to the plaintiff, that general rule in equity should control which forbids the interference by the court to enjoin a pending suit at law, to which there exists a perfect legal defense, or where the ground for relief is as equally available at law as in equity. In our judgment, however, this case presents those exceptional features, which make the interference of a court of equity necessary in order that the plaintiff may have the full benefit of the con-

tract, which, as the court has decided, was made between him and this defendant. Every case must, necessarily, be governed in its disposition by its facts and circumstances and the discretion of the court must be influenced in its exercise by a consideration of the relative injury and convenience, which may result from granting or refusing equitable relief by way of injunction. In the remedial exercise of its great power, a court of equity proceeds with a discretion which is controlled by legal principles and if, as in the present case, it is asked to stay an action at law, it must address itself to the consideration of whether, if it be a case where a legal defense to the action in fact exists, the plaintiff should be left to that as an adequate remedy, and whether any appreciable injury can result in denying him the right to establish the existence of some bar to the action at law and, thereupon, to have the same enjoined. The difference to the plaintiff between a trial of the action at law, in which all the scandalous matters would be made public and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issue would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial. The fact of a release would not prevent, in the former case, the ventilation of all the matters of complaint, real or fabricated; whereas, in the latter case, if it should be found that it was validly made and that there was an agreement not to harass by suits upon claims which had been settled and released, this plaintiff would be spared a public discussion of charges which the settlement between him and the defendant had disposed of. The specific performance of the contract, which is found to have been made by the defendant with the plaintiff, seems essential to justice; if the latter is to be assured of the benefits of the former's agreement with him.

The rule of specific performance will be extended to personal contracts, where the party wants the thing in specie and he cannot otherwise be compensated. (*Phillips v. Berger*, 2 Barb. 608; Story's Eq. Jur. § 716.) That is to say, the extension of the rule to such cases is justified, where there would not be a complete and satisfactory remedy by compensation in damages, or where the benefits of the contract would not inure fully to the party, in whose favor it was made, unless it was specifically performed.

It must be borne in mind that we are not concerned here with the nature, or the weight, of the evidence. It was sufficient to support the decision of the trial court, as to the matters of fact therein referred to, and the province of this court is limited to the field of inquiry into the disposition made of the principal legal question of the right to any equitable relief and of any other legal questions, which arose during the proceedings to judgment. Presented in that way, this case appears to us as one where, while there may have been an available legal defense to the pending action at law, that remedy was not adequate to the plaintiff's necessities and where there could be no adequate remedy short of the enforcement of this defendant's agreement. A specific performance of that agreement is indispensable to the security of the plaintiff against defendant's charges and revelations as to his past conduct, whether real or fabricated, which might affect his reputation and character in the community. This security he must be deemed to have obtained by his contract. It is not upon the principle that equitable relief is due to this plaintiff to protect him from oppressive or vexatious litigation, that we think that the decree of the trial court must rest for its correctness; but it is upon the principle that a specific performance of the defendant's agreement with the plaintiff is essential, if he is to receive its benefits, and, if he was entitled to specific performance, then the remedy of an injunction, restraining the defendant from doing the act which she has contracted not to do, was proper to be granted. The case of *Money v. Jordan* (2 DeGex, M. & G. 318) may be referred

to, as showing how a court of equity will be moved to interfere with proceedings at law, on finding that they would be in breach of an oral agreement. There the legal proceedings were to enforce a bond debt and they were enjoined, upon the ground that the bond creditor had declared that payment would never be enforced. The court found that he had agreed to that effect and would not suffer him to proceed at law. In our judgment, the equities of this case were apparent, and strong enough to warrant the trial court in exercising its jurisdiction to restrain the pending action at law.

Having reached this conclusion, we think that the order of the Appellate Division, reversing the judgment of the Special Term and directing a judgment for the defendant, was erroneous.]

There were numerous exceptions taken upon the trial. The greater part of them related to rulings which excluded evidence bearing upon the charges made in the complaint in the action at law. The objections to such questions were properly sustained. The issues to be tried were, whether the defendant executed the release of May 21st, 1892, and made the agreement of June 2nd, 1892, and whether they were invalidated by reason of any fraudulent practices, misrepresentation, or duress in their procurement. Evidence which bore upon these issues was admissible; but it was not competent to go into outside matters, or to try what was in issue between the parties in the other action. The truth or falsity of the charges in the complaint of this defendant, the nature of the relations between the parties and the promises and conduct of this plaintiff, prior to their settlements, and upon which this defendant predicated her complaint, were wholly immaterial to the issues which were being tried.

But a few of the other rulings need to be noticed. The witness Durant, head clerk for Howe and Hummel, who had appeared as the defendant's attorneys in the earlier action at law, was asked, on behalf of the plaintiff, "what were the statements or promises which she made and authorized you to communicate, as part of the agreement with the plaintiff, to

his attorney and that you did communicate." This was objected to upon the ground that it was "wholly outside of any agreement that they alleged in their papers and which they rely upon as part of this settlement" and that it was outside of any instruments which were set forth in the complaint and formed no part of the agreement or contract relied upon. The objection was overruled and the witness answered; stating what propositions of settlement he communicated to Cantoni's lawyer at the request of the defendant and which formed the basis of the settlement reached. There was no error in admitting the evidence. The complaint did not set up any contract in writing; but merely alleged that, in consideration of the sum of \$6,000 paid to the defendant, she contracted and agreed not to harass the plaintiff by suits. To prove that as a fact, Durant, through whom this defendant had acted, according to his testimony, was called as a witness. His evidence did not trench upon the rule, which forbids the alteration or variation of a written contract by parol evidence. It simply went to establish the making of the particular agreement not to sue and to induce which Cantoni paid the money demanded. It was that distinct and independent part of the general transaction leading to a settlement, upon which Cantoni might rely for his protection and of which he would be entitled to compel the specific performance.

Certain evidence was excluded, which bore upon the payment by Cantoni of the expenses and counsel fees of Howe and Hummel. It is difficult to see why the evidence was excluded; but, assuming that it was properly admissible, its exclusion cannot be regarded as an error of any importance. It was not material what the amount paid to Howe and Hummel was, in the absence of anything going to show that they had acted collusively with Cantoni to defraud or deceive the defendant, in settling with the plaintiff.

The defendant was asked whether she had ever released or discharged the plaintiff from the obligations of the contract set forth in her complaint, meaning the complaint in the action at law. The objection to this question was properly sus-

tained. The question at issue was whether she had, for a consideration, agreed not to harass the plaintiff by suits and whether she had executed the release, as alleged in this complaint. As to that, she had given her evidence and the question asked assumed the fact that there were obligations resting upon this plaintiff by reason of matters set up in the complaint in the action at law. Those matters, as it has above been mentioned, were not upon trial here.

We have carefully considered all of the other rulings which are not mentioned here; but we fail to find that any material error was committed, which rendered it proper to order a new trial.

The order and judgment of the Appellate Division should be reversed and the judgment of the Special Term should be affirmed, with costs to the appellant at the Appellate Division and in this court.

All concur.

Order and judgment reversed.

In the Matter of the Appraisal of the Estate of JOHN H. BEACH, Deceased, under the Transfer Tax Act.

CAROLINE A. JAMES, Appellant; THE COMPTROLLER OF THE CITY OF NEW YORK, Respondent.

1. TRANSFER TAX ACT — EXEMPTION BASED ON "MUTUALLY ACKNOWLEDGED RELATION OF PARENT." Within the provision of the Transfer Tax Act (L. 1892, ch. 399, § 2) which exempts from taxation transfers of real property, and of personal property not exceeding \$10,000 in value, passing to "any person" to whom the decedent, etc., "for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of parent," a testator may sustain to a person not of his blood, and not legally adopted, the relation of parent so as to entitle such person to the benefit of the exemption.

2. ILLEGITIMATE CHILDREN. The exemption based upon the "mutually acknowledged relation of parent" is not limited to illegitimate children, but extends as well to persons not of the blood of a testator, between whom and the testator the relation of parent and child has been mutually recognized for ten years prior to the testator's death.

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3. ADULTS. The fact that a person was at the inception of the mutually acknowledged relation an adult, does not exclude him from the benefit of the exemption.

Matter of Beach, 19 App. Div. 630, reversed.

(Argued October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 20, 1897, which affirmed so much of an order of the surrogate of the county of New York as assessed and fixed a transfer tax upon the interest of Caroline A. James in the estate of John H. Beach, deceased.

The facts, so far as material, are stated in the opinion.

Edward W. Sheldon for appellant. The testator, though a stranger in blood to the appellant, having for more than ten years prior to his death stood in the mutually acknowledged relation of her parent, the personal property bequeathed to her by his will is subject to a transfer tax of only one per cent, and the real property devised to her is exempt from taxation. (*In re Miller*, 110 N. Y. 216; *In re Nichols*, 91 Hun, 140; *In re Moore*, 90 Hun, 162; *In re Butler*, 58 Hun, 400; *In re Spencer*, 4 N. Y. Supp. 395; *In re Capron*, 10 N. Y. Supp. 23; *In re Sweetland*, 20 N. Y. Supp. 310; *In re Wheeler*, 1 Misc. Rep. 450; *In re Thomas*, 3 Misc. Rep. 388; *In re Moulton*, 11 Misc. Rep. 694; *In re Stilwell*, 34 N. Y. Supp. 1123.)

Emmet R. Olcott for respondent. The provision of the statute relating to persons to whom the decedent stood "in the mutually acknowledged relation of a parent," covers only the case where an illegitimate child has been recognized by its parent, and such recognizance has been mutual and has continued for ten years or more. (L. 1892, ch. 399; *In re Hunt*, 86 Hun, 232.)

ANDREWS, Ch. J. John H. Beach, a resident of the city of New York, died September 28, 1893, leaving a will dated

February 12, 1892, and a codicil thereto dated February 15, 1892, by the latter of which instruments he devised and bequeathed to the appellant, Caroline A. James, his residence in said city of the value of about \$100,000 and the furniture of the value of \$4,536.75. The appellant is the wife of David H. James, and on the appraisal of the property of the testator for the purpose of taxation under the Transfer Tax Act (Chap. 399 of the Laws of 1892) she claimed that the property given to her by the will of Mr. Beach was exempt from taxation under that provision in section two of the act which exempts from such taxation real property, and also personal property not exceeding ten thousand dollars in value, passing by will, deed or gift to "any person to whom any such decedent, grantor, donor or vendor, for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent." The testator was at the time of his death a widower, sixty-eight years of age, having no children or lineal descendants. He had been the intimate friend and adviser of the husband of Mrs. James from his boyhood. Mrs. James was about twenty-five years younger than the testator, and was not related to him by blood or marriage. For the purpose of this case it is sufficient to state that in 1881, according to the uncontradicted evidence, the appellant and her husband, at the solicitation of the testator (he then being a widower), became members of his family under an oral understanding between them that Mrs. James should be regarded and treated by him as a daughter, and that she should regard him as a parent, and render such services as a daughter would naturally render to a father. In 1882, the testator, upon consultation with Mrs. James, purchased the house and lot devised to her by the will, and thereafter, until his death, he, with Mrs. James and her husband occupied the house as one family. Mrs. James managed the affairs of the household, waited upon and nursed the testator when ill, and he on his part defrayed the household expenses. The testator introduced the appellant as his daughter, and, in short, the evidence is, that from 1881 until the death of the testator in 1893, the

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assumed relation of parent and child continued between the testator and Mrs. James without interruption, and was publicly acknowledged, each rendering to the other the reciprocal duties and services incident to the actual relation of parent and child. It is indeed insisted in behalf of the comptroller of the city of New York that the order below may be affirmed on the ground that the surrogate may have found the non-existence of any mutually acknowledged relation of parent and child between the testator and Mrs. James, as a matter of fact. But the evidence on that question did not admit of opposing inferences, and it is plain from a perusal of the record that the surrogate held himself concluded by the decision of the General Term in the first department in *Matter of Hunt* (86 Hun, 232), to the effect that the clause above quoted from the act of 1892 was intended for the benefit of illegitimate children only, and that a person not of the blood of the testator, donor or grantor was not entitled to the exemption under that clause, however clear may have been the intention of the parties to assume the practical relation of parent and child, or however long such assumed relation may have continued. In this case the Appellate Division of the first department affirmed the order of the surrogate imposing the tax upon the authority of the case of *Hunt*, without an opinion. Upon the record it must be taken as established that the assumed relation of parent and child existed between the testator and Mrs. James for ten years prior to his death, and the question to be determined is whether a testator may, within the second section of the act of 1892, sustain to a person not of his blood, and in the absence of a legal adoption of such person as his child, the relation of parent so as to entitle such person, for whom provision is made in the will, to the benefit of the exemption. There is a serious conflict upon the subject in the decisions in the Supreme Court. In the case of *Nichols* (91 Hun, 140), decided by the General Term of the third department, and in the case of *Butler* (58 Hun, 400), decided by the General Term of the second department, the construction put upon the statute by the first

department in the case of *Hunt*, which limited the mutual acknowledgment clause to the case of illegitimate children, was not adopted, but the clause was held to cover the case of persons not of the blood of a testator, between whom the relation of parent and child had been mutually recognized for the period of ten years prior to the testator's death. We are required in the present case to determine this controverted question.

The material part of section. 2 of the act of 1892 is as follows: "When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any person to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless," etc. There are three classes of cases contemplated by this section, in which the parental relation is to be regarded as existing for the purposes of the section. The *first* is the actual legal relation of parent and child, between parents and their children born in lawful wedlock. This relation is defined by the designation "child" in the enumeration in the first clause of the section, since the word child or children used in statutes or wills, unless the meaning is extended by the context, is, in general, deemed to intend legitimate children only. (4 Kent, 414, 417, notes, and cases cited.) The *second* class are persons adopted as children in conformity with the laws of the state. The formalities required for the legal adoption of children and the legal rights resulting therefrom are prescribed and defined by chapter 830 of the Laws of 1873, and the amendatory act, chapter 703 of the Laws of 1887. Under these acts minors alone are the subjects of adoption. But it is not required that an adopted child shall be of the blood

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of the person adopting him, or otherwise related to him. The *third* class is the one under consideration in the present case. This class embraces "any person" to whom the decedent, etc., "for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent." Was it the intention of the legislature by this clause to provide for the case of illegitimate children only? The language imports no such limitation. The words "any person" seem inconsistent with so narrow a construction. There can be no doubt that illegitimate children may come within the description, but the question is are all other persons excluded? It is to be observed that if this clause was intended to apply to illegitimate children only, there was no difficulty in making the intention plain. The court, in construing the words "any person," is asked to interject the word "illegitimate," which the legislature omitted. Moreover, the section, taken together, gives no color to the suggestion that the legislature intended to favor illegitimates as such. They were excluded, as we have seen, in the designation of persons contained in the first clause of the section. They might be adopted and so entitled to the exemption under the second alternative clause. But they would become so entitled by reason of their adoption, and not of their relationship to the parent prior to their adoption. In the third alternative clause relationship by blood is not by any words used made a condition to the creation of the relationship of parent and child, and to confine the meaning of the words "any person" to natural children is not justified by the ordinary rules of interpretation. As in cases of adoption, natural children may come within the description and be entitled to the exemption. But, as we construe the statute, the fact that they were natural children would be an immaterial circumstance. The question in such case would be, was the relation of parent and child mutually acknowledged between the testator and the claimant for at least ten years prior to the testator's death? If it had been the intention of the legislature to benefit the innocent child of meretricious commerce, there would seem to be no reason why any period

of time should be interposed, during which the relation should be acknowledged, as a condition of the child's enjoying the benefit conferred. The death of the parent before the child reached the age of ten years, or an acknowledgment of the relation, deferred to a period within ten years of the death of the parent, would deprive the child of the benefit of the exemption, a result which would seem to be most unjust if the legislature enacted the statute in the interest of illegitimates. The legislature, at the time of the enactment in question, had in mind the question of legitimacy, for it excluded illegitimate descendants of a decedent from the benefit of the exemption by the words "or to any lineal descendant of such decedent, etc., born in lawful wedlock." In other words, illegitimate descendants are not entitled as such to the exemption in any case, or under any circumstances. They only became so entitled under the alternative clause when the conditions of the statute are met, and then not because they are illegitimate, but because they are embraced within the words "any person," etc. The use of the words "mutually acknowledged" has been regarded as giving force to the view that illegitimate children were alone in the contemplation of the legislature. It is said that a fact may be acknowledged, and that the words "mutually acknowledged" do not properly express a relation not existing in fact. We think they were used as equivalent to the words "mutually recognized." The illegitimate child could not know the fact of its parentage, and it is difficult to suppose that, by the use of the words "mutually acknowledged relation," the legislature intended to denote the actual relation between a parent and his illegitimate offspring, and an open acknowledgment of that relation between themselves and the public for the period mentioned. The clause, we think, was intended to have a broader scope; to include, among others, those cases, not infrequent, where a person without offspring, needing the care and affection of some one willing to assume the position of a child, takes, without formal adoption, a friend or relative into his household, standing to such person *in loco parentis*, or as a parent, and receives in return

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filial attention and service. The fixing of a period of ten years, during which the relation must continue in order to entitle such person to the benefit of the exemption, is a safeguard against imposition, and when for that period this relation has been mutually acknowledged, the case is fairly brought within the policy upon which children are exempted from the imposition of a tax upon property derived under the will of their parents.

The fact that the claimant was at the inception of the relationship between herself and Mr. Beach, an adult, does not, we think, take the case out of the statute. The words "any person" include both minors and adults, and we are not at liberty to make an exception not contained in the statute. The fact that the person claiming to stand in *loco filiae* was an adult when the alleged relationship had its inception, may well be regarded in considering the degree and sufficiency of the evidence, but if the relationship is established by competent and satisfactory proof, it is not a bar to relief that at its origin both parties were adults. It is not suggested that the evidence can be changed on a rehearing, and our conclusion is that the order of the Appellate Division and of the surrogate should be reversed, and that an order be entered declaring the property given to Mrs. James by the will of the testator exempt from taxation under the act of 1892.

All concur.

Order reversed.

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JAMES C. FARGO et al., as Executors of WILLIAM G. FARGO, Deceased, Respondents, v. HERBERT G. SQUIERS et al., as Executors of GEORGIA FARGO, Deceased, et al., Appellants, and MARY C. FARGO and ANNA E. FARGO, Respondents.

1. WILL — POWER OF APPOINTMENT — SUSPENSION OF OWNERSHIP. In applying the statutory rule as to the suspension of the absolute ownership of personal property (1 R. S. 773, § 1), the provisions of a will which attempt to execute a power of appointment conferred by will must be tested by reading them into the will which created the power.

2. ATTEMPTED EXECUTION OF POWER OF APPOINTMENT — UNLAWFUL SUSPENSION OF OWNERSHIP. An attempt, by a will which undertakes to execute a power of appointment conferred by will, to postpone the absolute ownership of personal property covered by the power of appointment, by lives which were not in being at the death of the maker of the will which created the power, violates the statute.

3. TRUST — NON-VESTING OF OWNERSHIP. A trust is created and the ownership of the property is not vested in the beneficiaries as of the date of the death of the maker of the will, but is suspended, where a will gives the property to the executors in trust, to care for and manage it, with extraordinary powers of sale and investment, not only during the infancy of certain beneficiaries, but until they attain a specified age beyond majority, and there is an uncertainty as to the persons who may ultimately take in possession.

4. APPLICATION OF TESTAMENTARY FUNDS, AS BETWEEN SPECIFIC LEGACIES AND RESIDUARY TRUST — EQUITY. When the subject-matter of a will which creates a trust consists of two estates or funds, one of which is an individual estate which can be lawfully devoted to the purposes of the trust and the other is an appointive estate which cannot be so devoted, and the will contains specific legacies with no direction as to the fund out of which they shall be paid and discloses an intention to devote the whole of the residuary estate to the use of the beneficiaries of the trust, equity can, for the purpose of carrying out such intention so far as lawful, require the specific bequests to be paid out of the appointive estate and thus save the individual estate unimpaired to constitute the trust.

Fargo v. Squiers, 6 App. Div. 485, modified.

(Argued October 21, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July

21, 1896, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John G. Milburn for executors of Georgia Fargo, deceased, appellants. Assuming that Georgia Fargo, by her will, attempted to create trusts in favor of the Squiers children, and that such trusts are void by reason of suspending the power of alienation during lives not in being at the death of William G. Fargo, then such trusts are to be expunged from the will, leaving open only the question whether intestacy followed, or whether the bequests can be sustained as vested in the legatees. (*Smith v. Edwards*, 88 N. Y. 92, 102; *Greene v. Greene*, 125 N. Y. 512; *Woodgate v. Fleet*, 64 N. Y. 570; *Townshend v. Frommer*, 125 N. Y. 446; *Everitt v. Everitt*, 29 N. Y. 39; *Manice v. Manice*, 43 N. Y. 303; *Locke v. F. L. & T. Co.*, 140 N. Y. 135.) The bequests in favor of the Squiers children, expunging the trusts, vested in them at the death of the testatrix. (*Moore v. Littell*, 41 N. Y. 66; *Radley v. Kuhn*, 97 N. Y. 35; *Armstrong v. Williamson*, L. R. [3 App. Cas.] 335; *Tucker v. Bishop*, 16 N. Y. 102; *Warner v. Durant*, 76 N. Y. 133; *Vanderpoel v. Loew*, 112 N. Y. 167; *Robert v. Corning*, 89 N. Y. 225; *Patterson v. Ellis*, 11 Wend. 260; *Kane v. Gott*, 24 Wend. 641; *Goebel v. Wolf*, 113 N. Y. 405; *Bliven v. Seymour*, 88 N. Y. 469.) The limitations over in the event of any of the children dying under thirty years of age being void, the general rule applies that where the effect of such a limitation over is to abridge or defeat the prior estate, the result of such contingent limitation being held void for remoteness is that the person whose estate would be defeasible if such contingent limitation were valid takes the estate discharged of the condition or limitation over. (*Manice v. Manice*, 43 N. Y. 303, 383; *Everitt v. Everitt*, 29 N. Y. 39; *Robert v. Corning*, 89 N. Y. 225; *Radley v. Kuhn*, 97 N. Y. 36; *Oxley v. Lane*, 35

N. Y. 340; *Harrison v. Harrison*, 36 N. Y. 543; *Tiers v. Tiers*, 98 N. Y. 568; *Henderson v. Henderson*, 113 N. Y. 1; 2 Sugden on Powers, 85; *Warner v. Howell*, 3 Wash. C. C. 12; *Fry v. Kappen*, Kay, 163.) The judgment should be reversed and the will of Georgia Fargo sustained as a valid execution of the power of appointment with which she was invested. (*Tiers v. Tiers*, 98 N. Y. 573; *Radley v. Kuhn*, 97 N. Y. 35; *Moore v. Littel*, 41 N. Y. 66.) If it be held that the 13th article of Georgia Fargo's will is valid only as to her individual estate, we submit that the legacies and expenses of administration should be paid out of the property which she had the power to appoint, either in whole or *pro rata*. (2 Jarman on Wills [5th ed.], 626, 687, 688; *Roberts v. Walker*, 1 R. & M. 752; *Bench v. Miles*, 4 Madd. 187.)

William D. Guthrie, guardian *ad litem*, for Squiers infants, appellants. The legacies to the Squiers children vested at the time of the death of Georgia Fargo, and the postponement of the period of actual payment does not constitute any unlawful suspension of the absolute ownership of personal property. (*Vanderpoel v. Loew*, 112 N. Y. 167; *Radley v. Kuhn*, 97 N. Y. 26; *Everitt v. Everitt*, 29 N. Y. 39; *Manice v. Manice*, 43 N. Y. 303; *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 N. Y. 92; *Bliven v. Seymour*, 88 N. Y. 469; *Bushnell v. Carpenter*, 92 N. Y. 270; *Shannon v. Pentz*, 1 App. Div. 331; *Goebel v. Wolf*, 113 N. Y. 405; *Miller v. Gilbert*, 144 N. Y. 68.) The primary purpose of the will of Georgia Fargo was to bequeath the principal to the Squiers infants. That intention is not defeated by any illegal direction for accumulations or by void limitations over in case of death without issue and without exercising the right to dispose of the estate by deed or will. (*Beardsley v. Hotchkiss*, 96 N. Y. 201; 1 R. S. 726, § 40; *Cochrane v. Schell*, 140 N. Y. 516; *Williams v. Williams*, 8 N. Y. 525; *Deegan v. Wade*, 144 N. Y. 573; *Manice v. Manice*, 43 N. Y. 303; *Radley v. Kuhn*, 97 N. Y. 26;

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Points of counsel.

Tiers v. Tiers, 98 N. Y. 568; *Van Horne v. Campbell*, 100 N. Y. 287.) In any respect the will before the court does not offend the rule against perpetuities, and the effect of its provisions is not to suspend the absolute ownership of personal property. (*Manice v. Manice*, 43 N. Y. 303; *Cutting v. Cutting*, 86 N. Y. 522; *Cochrane v. Schell*, 140 N. Y. 516; 2 Lewin on Trusts, 689, 692, 693; Williams on Ex. 1398; *Saunders v. Vautier*, 4 Beav. 115; *Greet v. Greet*, 5 Beav. 123; *Harrison v. Grimwood*, 12 Beav. 192; *Jackson v. Majoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 Sim. 48; *Farmer v. Francis*, 2 Bing. 151.) If the provisions of the article of the Revised Statutes on uses and trusts are to be extended to personal property, there is no such suspension of ownership as to violate the rule of perpetuities. (*Radley v. Kuhn*, 97 N. Y. 26; *Sawyer v. Cubby*, 146 N. Y. 192; *Gilman v. Reddington*, 24 N. Y. 9; 1 R. S. 725, 730, §§ 35, 63; *Hawley v. James*, 16 Wend. 61.) The declared intention of the testatrix to execute the power of appointment should be effectuated. (*Hume v. Randall*, 141 N. Y. 499; *Crooke v. County of Kings*, 97 N. Y. 421; *Townshend v. Frommer*, 125 N. Y. 446; *In re Miner*, 146 N. Y. 121; 1 R. S. 737, § 123; *Hillen v. Iselin*, 144 N. Y. 365.)

Lewis Cass Ledyard for executors of William G. Fargo, deceased, respondents. No valid exercise of the power of appointment was effected by Georgia Fargo's will, for the reason that her attempt to exercise it was an attempt to suspend the absolute ownership of the property beyond the period limited by law. (1 R. S. 723, § 14; 729, § 60; 730, §§ 63, 65; 737, §§ 128, 129; 773, § 1; *Graff v. Bonnett*, 31 N. Y. 9; *Manice v. Manice*, 43 N. Y. 303.) The will of William G. Fargo effected an equitable conversion of his property from real into personal estate, as he directed that it should be sold and converted into money. For the purposes of this case, therefore, the property should be regarded as personal property. (*Kane v. Gott*, 24 Wend. 659; *Moncrief v. Ross*, 50 N. Y. 431; *Power v. Cassidy*, 79 N. Y. 602; *Robert v.*

Corning, 89 N. Y. 225; *Genet v. Hunt*, 113 N. Y. 158; *Dana v. Murray*, 122 N. Y. 604; *Salmon v. Stuyvesant*, 16 Wend. 324; *Maitland v. Baldwin*, 70 Hun, 267; *Hillen v. Iselin*, 67 Hun, 444; 144 N. Y. 365; 1 Jarman on Wills [R. & T. ed.], 561; *Knox v. Jones*, 47 N. Y. 389.) The will of Georgia Fargo created a formal and technical trust which, apart from the rule against perpetuities, was entirely valid. It is this trust which suspends absolute ownership. It cannot, however, be disregarded or be cut out of her will and leave anything whatever to take effect. (1 R. S. 729, §§ 58, 60.) The circumstance that the trust in Georgia Fargo's will offends against the rule which prohibits the suspension of the absolute ownership, can have no legitimate place in any discussion which has for its purpose the construction of her will or the ascertainment of her intention. (Gray on Perpetuities, § 629; *Dungannon v. Smith*, 12 Cl. & Fin. 559; *Van Nostrand v. Moore*, 52 N. Y. 18; *Cottman v. Grace*, 112 N. Y. 309.) The argument advanced in support of Georgia Fargo's will proceeds upon a total misapprehension of the cases in which invalid provisions are allowed to be cut off or disregarded, in order that effect may be given to valid provisions in the same will. The cases, and we believe the only cases, in which this is ever done are those in which both valid and invalid provisions are contained in the same will, and they are so far separable and distinct that the invalid provisions may be eliminated, and the valid provisions enforced without doing violence to the general scheme or principal purpose of the testator. (*Jennings v. Jennings*, 7 N. Y. 547; *Haynes v. Sherman*, 117 N. Y. 433; *Knox v. Jones*, 47 N. Y. 389; *Maitland v. Baldwin*, 70 Hun, 267; *Cowen v. Rinaldo*, 82 Hun, 486.) The argument of the appellants that if we assume that a trust was created by Georgia Fargo's will, and that this trust was void as suspending the absolute ownership during lives not in being at the death of William G. Fargo, still the result of this invalidity is not necessarily intestacy is untenable. (1 R. S. 723, §§ 14, 15; *Post v. Hover*, 33 N. Y. 593; *Tucker v. Tucker*, 5 N. Y. 408; *Benedict v. Webb*, 98 N. Y. 460;

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Haynes v. Sherman, 117 N. Y. 433.) If there had been no trust created by the will it would not avail the appellants for the interest given to the Squiers children was not a vested, but a contingent one. (*Cochrane v. Schell*, 140 N. Y. 516.)

Edward E. Tanner for Anna E. Fargo et al., respondents. The trust, created in the will of Georgia Fargo is absolutely void, as it suspends the absolute ownership during the lives of the Squiers children, who were not in being at the time of the death of Mr. Fargo. (1 R. S. 772, § 13; 773, §§ 1, 2, 3; *Smith v. Edwards*, 88 N. Y. 92.) The Squiers children take only a contingent interest, or a contingent remainder, the whole title, legal and equitable, vesting in the trustees. (*Amery v. Lord*, 9 N. Y. 403; *Knox v. Jones*, 47 N. Y. 390; *Smith v. Edwards*, 88 N. Y. 92; *Talmadge v. Seaman*, 85 Hun, 245; *Sweet v. Chase*, 2 N. Y. 80; *Vawdry v. Geddes*, 1 R. & M. 203; *Norris v. Beyea*, 13 N. Y. 273.) The trust cannot be expunged so as to vest an immediate estate in the Squiers children, when none was intended. (*Genet v. Hunt*, 113 N. Y. 158; *Dana v. Murray*, 122 N. Y. 604; *Greenland v. Waddell*, 116 N. Y. 240; *Harris v. Clark*, 7 N. Y. 242; *Adams v. Perry*, 43 N. Y. 488; *Norris v. Beyea*, 13 N. Y. 273; *Greyston v. Clark*, 41 Hun, 125; *Nathan v. Hendricks*, 87 Hun, 483; *Coven v. Rinaldo*, 82 Hun, 480; *Johnson v. Brasington*, 86 Hun, 109; *Cottman v. Grace*, 112 N. Y. 308.) The consequence of the invalidity of the trust created is the same as if Georgia Fargo had died intestate. (*Tiers v. Tiers*, 98 N. Y. 568; *Henderson v. Henderson*, 113 N. Y. 1, 16; *Robert v. Corning*, 89 N. Y. 225; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Everitt v. Everitt*, 29 N. Y. 78; *Greenland v. Waddell*, 116 N. Y. 240; *Dana v. Murray*, 122 N. Y. 604; *Cottman v. Grace*, 112 N. Y. 308; *Harris v. Clark*, 7 N. Y. 242; *Norris v. Beyea*, 13 N. Y. 273; *Adams v. Perry*, 43 N. Y. 488; *Genet v. Hunt*, 113 N. Y. 158.)

HAIGHT, J. This action was brought by the plaintiffs, as executors and trustees under the will of William G. Fargo, to

obtain a construction of the will of Georgia Fargo, who attempted to exercise the power of appointment given her under the will of William G. Fargo.

William G. Fargo, a resident of the city of Buffalo, died on the 3d day of August, 1881, leaving a last will and testament, in which he disposes of the residue and remainder of his estate, after making specific bequests, by giving it to his executors in trust, to convert into money and to invest, with directions to divide into three equal parts, one of which parts was to be held by his executors for the benefit of his daughter Georgia during life, another part for his daughter Helen Lacy, and the remaining third for his granddaughters, Anna E. Fargo and Mary C. Fargo, the daughters of his deceased son. With reference to the estate given to his executors as trustees for his daughter Georgia, he provides that, "upon the death of my said daughter, the principal sum so held in trust for her, under this provision of my last will and testament, shall be paid and distributed by my executors, as she shall by her last will and testament direct; but if my said daughter shall die intestate, then if she leave issue her surviving, the said principal sum shall be at once distributed to such issue. If my said daughter shall die intestate, leaving no issue her surviving, then my executors shall distribute, except as hereinafter provided; the said principal sum to my heirs at law then living, each taking the share therein they would have taken had the same been real estate in the state of New York, of which I had died seized intestate and survivor of my wife, and had my death been immediately subsequent to the death of my said daughter." His daughter died on the 10th day of September, 1892, without issue, but leaving a last will and testament, in which she first declared her intention to dispose of all of her estate to which she was in any manner entitled, and to direct the payment and distribution by the executors of the will of her father, of the sum held in trust for her under the provisions of the will, in execution of the power of appointment vested in her thereby. She makes specific bequests, amounting to about the sum of fifty thousand dol-

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lars; and then, by the thirteenth clause of her will, provides: "All the rest and residue of my estate of every kind and nature whatsoever, including that of which I have the power of appointment under the will of my father and any legacy which may lapse or fail, I give and bequeath to my executors in trust, however, for the following purposes: To divide the same into four equal parts and to hold one of said parts for the use and benefit of Gladys Fargo Squiers; another of said parts for the use and benefit of William George Fargo Squiers; another of said parts for the use and benefit of Georgia Fargo Squiers; and another of said parts for the use and benefit of Helen Fargo Squiers, in trust, to accumulate the income, issues, rents and profits derived from each such share until the beneficiary shall have attained the age of twenty-one years, or in case of his or her death prior to attaining such majority, until such death; such accumulation to belong absolutely to each beneficiary and to be paid over to the beneficiary on his or her attaining his or her majority, or to his or her estate in case of his or her death prior to attaining such majority, free from any trust whatsoever. After the beneficiary has attained the age of twenty-one, and until he or she attains the age of twenty-five, the said shares to be held in trust, the rents, issues and profits to be paid over annually to such beneficiary, and on his or her attaining the age of twenty-five, one-half of such share to be paid over to him or her absolutely. After he or she attains the age of twenty-five, and until he or she attains the age of thirty, the rents, issues and profits of the remaining one-half to be paid over to such beneficiary, annually, and on his or her attaining the age of thirty years, the said remaining half to be paid over to him or her absolutely."

Other provisions follow in which it is provided that, in case of the death of the beneficiaries before arriving at the age of thirty years, the fund should be paid to their issue, if any; if there be no issue, then to the persons appointed by their wills, if any. If there be no issue and no appointees, then to the brothers and sisters of the beneficiaries, if any, and if

there be no issue, appointees, brothers or sisters, then to Anna E. and Mary C. Fargo, the granddaughters of William G. Fargo.

The beneficiaries named are the children of Helen Lacy Squiers, all of whom were born after the decease of William G. Fargo.

The trust estate created by the will of William G. Fargo was, by the express provisions of the will, converted into personal property; and the courts below have held, with reference to the bequest to the Squiers children under the will of Georgia Fargo, that a trust was created suspending the absolute ownership of one-half of the property until such children should become twenty-five years of age, and the other half until they should become thirty years of age respectively; that this was a violation of the statute, which provides that "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator." (1 R. S. 773, section 1.) Such, undoubtedly, is the effect of the provision, if a trust were created, in so far as it relates to the trust estate created by the will of the testatrix's father, of which she had the power of appointment. The statute further provides that in all other respects (referring to the section above quoted) limitations of future or contingent interests in personal property shall be subject to the rules prescribed in relation to future estates in lands. (1 R. S. 773, section 2.)

In the case of *Mills v. Husson* (140 N. Y. 99-104) it was held that the rules governing estates or interests in lands are, so far as practicable, applied to estates or interests of a like character in personal property.

With reference to lands it is provided that "the period during which the absolute right of alienation may be suspended, by any instrument in execution of a power, shall be computed,

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not from the date of such instrument, but from the time of the creation of the power. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted." (1 R. S. 737, sections 128, 129. See, also, *Genet v. Hunt*, 113 N. Y. 158; *Hillen v. Iselin*, 144 N. Y. 365; *Everitt v. Everitt*, 29 N. Y. 39, 78; *Dana v. Murray*, 122 N. Y. 604-616.)

The validity of the provisions of the will of Georgia Fargo, in so far as she attempted to execute the power of appointment, must, therefore, be tested by reading the provisions of her will into the provisions of the will of William G. Fargo, which created the power. So tested, we find that the Squiers children, not being in existence at the time of the death of William G. Fargo, any attempt to postpone the absolute ownership of the property in these children would be a violation of the provisions of the statute.

It is contended, however, that no trust was created by the will of Georgia Fargo, and that the Squiers children were vested with the ownership of the property as of the date of her death. We recognize fully the principle that trusts are not necessary for the care of the property of infants during their minority; but in this case we have something more; the will in express terms gives and bequeaths to the executors in trust. By the eighteenth clause of the will she authorizes and empowers her executors "to take possession of all my real estate which is devised by this, my last will, and which is included in the estate to be paid and distributed by the exercise of the power of appointment vested in me by the seventh clause of my father's will, and to collect and receive the rents and profits thereof, and to sell and dispose of all or any part thereof, at such time or times, and in such manner as to them, in their discretion, may seem expedient and proper, and to execute and deliver deeds to the purchasers, and also to convert or collect any personal estate, and to invest and keep invested the proceeds of my real and personal estate in such manner as

to them may seem most judicious, without reference to any legal restrictions which may exist as to the nature of the investment of trust funds to be made by executors and trustees under the laws of this state, and to collect and receive the income thereof."

The will not only provides for the care of the fund and estate during the minority of the infants, but continues such care one-half until they become twenty-five years of age, and the other half until they become thirty years of age, respectively. Here we have express provisions creating a trust, providing for its management, empowering the trustees to convey real estate, and giving them extraordinary powers with reference to the investments, independent of the statute. No case to which our attention has been called by the appellants' counsel meets the provisions contained in this will. To hold that no trust was created, would, in effect, overrule many well-considered cases upon the subject and make it difficult, if not impossible, to draft a provision in a will which would constitute a valid trust.

We are aware that the law favors the vesting of estates, and where there is nothing in the will showing a different intention, the courts are inclined to construe wills as vesting the estate as of the date of the death of the testator. But this can only be done where there is no contingent remainder or uncertainty as to the person or persons entitled to take. In this case the provisions of the will leave the persons who may ultimately take in possession quite uncertain. Upon the happening of certain contingencies, the grandchildren, Anna E. and Mary C., may ultimately be entitled to the possession of the whole estate. This fact alone prevents the vesting of the absolute ownership in the Squiers children until such time as they may become entitled to take in possession. This branch of the case has been fully considered in the opinion written by the Appellate Division, in which we fully concur, and do not, therefore, deem it necessary to further prolong the discussion upon this subject.

It appears from the record before us that, at the time of

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her decease, Georgia Fargo had an individual estate valued at the sum of eighty thousand dollars. By her will she announces her intention to dispose of her individual estate, as well as that of which she had the power of appointment. She then makes specific bequests, amounting, as we have shown, to about fifty thousand dollars, without specifying whether the payments should be made out of her individual estate, or that of which she had the power of appointment. The power of appointment given by her father's will was general and without limitation. She had the power to require that each of her specific bequests should be paid out of the trust fund. She then, by the thirteenth clause of her will, creates a trust in favor of the Squiers children, to which we have already alluded, in which she bequeaths all the rest and residue of her individual estate, including the estate of which she had the power of appointment. The words "rest and residue" may apply to the estate of which she had the power of appointment, as well as to her individual estate; and if these specific bequests made by her exceed her individual estate there could be no question but that they would be payable out of the trust estate created by her father. The trust created by her in this clause of her will is, as we have shown, invalid so far as it was made up out of the estate of which she had the power of appointment, but was perfectly valid in so far as it was made out of her individual estate. We thus have this situation presented: A will in which a trust is created for the benefit of infant children; an estate in which there are two funds, one of which can lawfully be devoted to the purposes of the trust and the other not, and specific legacies in regard to which there has been no direction as to the fund out of which they should be paid. There is no question respecting her intention. She intended the whole of her residuary estate, including that of which she had the power of appointment, to be held for the use of the Squiers children. In so far as her will is in violation of the statute her intention cannot be carried out, but a court of equity, in the exercise of its discretion, has the power to carry out the intention of the testatrix, as disclosed by her will, so

far as it is not violative of the provisions of the statute. It cannot devote the trust estate created by the will of William G. Fargo to the making up of the trust created by the will of Georgia Fargo; but it can, for the purpose of carrying out her wishes and intention, require the specific bequests to be paid out of the estate of which she had the power of appointment, thus saving her individual estate unimpaired to constitute the trust provided for by her will. Ordinarily, perhaps, the individual estate would first be exhausted in payment of the specific bequests; but in this case to so pay the specific bequests would not only defeat the main object and purposes of the will, but the intention of the testatrix. The situation is not an uncommon one in principle; it is analogous to the marshaling of the estates of a deceased person. The rule is that the personal estate must be first exhausted in the payment of the debts to the relief of the real estate; but courts of equity will not enforce this rule where it is in apparent hostility to the purpose and intent of the will, and will defeat the bequests made therein. The equitable rule is that where one claimant has two funds to which he may resort to answer his demand, and another claimant has an interest in only one of such funds, he can compel the former to take satisfaction out of the fund in which the latter has no lien, and this rule is applicable to legatees as well as creditors. (*Rice v. Harberson*, 63 N. Y. 493; *Gainsford v. Dunn*, L. R. [17 Equity Cases] 405; *Wilday v. Barnett*, L. R. [6 Equity Cases] 193; *Wollaston v. King*, L. R. [8 Equity Cases] 165.)

The judgment should be modified so as to direct the payment of the specific legacies under the will of Georgia Fargo out of the residuary estate of William G. Fargo, held in trust for Georgia Fargo, before distribution, and as so modified affirmed, with costs to all parties payable out of the individual estate of Georgia Fargo.

All concur, except VANN, J., not voting.

Judgment accordingly.

JOHN FITZGERALD, as Administrator of THOMAS FITZGERALD,
Deceased, Respondent, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Appellant.

NEGLIGENCE — RAILROADS — DEATH OF FREIGHT BRAKEMAN — LOW BRIDGE — INSUFFICIENT EVIDENCE AS TO CAUSE OF DEATH. In an action for damages for the death of a freight brakeman, alleged to have resulted from the negligence of the defendant railroad company in failing to provide the warning signals required by statute (L. 1884, ch. 439, § 2) to protect employees on top of cars from injury by a low bridge, *held*, that the essential fact that the death was caused by the bridge was not established by evidence that the deceased was standing apparently in good health on the top of a car just before the train passed under the bridge, which was from four feet seven inches to six feet three inches above the tops of the cars, and that immediately thereafter he was found lying on top of the same car, near the center, in a dying condition, without the production of, or the effort to procure, further evidence that he died from violence instead of disease, such as evidence tending to show a wound or a bruise upon his person.

Fitzgerald v. N. Y. C. & H. R. R. Co., 88 Hun, 359, reversed.

(Argued October 26, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered October 9, 1895, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion. (See, also, 59 Hun, 225, and 88 Hun, 359.)

C. D. Prescott for appellant. The verdict in favor of the plaintiff was against the weight of evidence, and was such that only one inference could be drawn therefrom by an honest mind, and the court could have directed a verdict for the defendant or granted a nonsuit. (*Wilds v. Hudson R. R. Co.*, 24 N. Y. 433; *Smith v. N. Y. C. & H. R. R. Co.*, 19 Wkly. Dig. 230; *Gibson v. E. R. Co.*, 63 N. Y. 449; *Hickey v. Taaffe*, 105 N. Y. 26; *Anthony v. Leeret*, 105 N. Y. 592; *De Graff v. N. Y. C. & H. R. R. Co.*,

76 N. Y. 125, 128; *Cahill v. Hilton*, 106 N. Y. 512; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. B. & J. E. Co.*, 101 N. Y. 520.)

Hadley Jones for respondent. The negligence of the defendant was clearly established. (*McRickard v. Flint*, 114 N. Y. 222; *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522; S. & R. on Neg. [4th ed.] §§ 13, 187, 467; *Willy v. Mulledy*, 78 N. Y. 310; *Clemence v. City of Auburn*, 66 N. Y. 334; Cooley on Torts, 654; *Hover v. Barkhooff*, 44 N. Y. 113; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 El. & Bl. 402.) The question of contributory negligence was properly submitted to the jury. (*McRickard v. Flint*, 114 N. Y. 222; *Halsey v. R. R. Co.*, 12 N. Y. S. R. 319; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *Bucher v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 128; S. & R. on Neg. §§ 187, 354; *Salter v. U. & B. R. R. Co.*, 88 N. Y. 49; *Bell v. N. Y. C. & H. R. R. Co.*, 29 Hun, 560; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 38; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 547; *Dana v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 639; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 551; *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Wallace v. C. V. R. R. Co.*, 138 N. Y. 302.) Whether the defendant was guilty of negligence in failing to guard this bridge and whether it was unguarded; whether the deceased knew its position, or might have ascertained it by the exercise of ordinary care, and whether he was guilty of contributory negligence, were all questions of fact and properly submitted to the jury. (*Wallace v. C. V. R. R. Co.*, 138 N. Y. 302; *B. R. R. Co. v. Rowan*, 104 Ind. 88; *Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383.)

VANN, J. This action was brought by an administrator to recover damages resulting, as alleged, from the negligence of

the defendant in failing to provide the warning signals required by statute to protect "employees on top of cars from injury" by low bridges overhanging railroad tracks. (L. 1884, ch. 439, § 2.)

The accident is alleged to have occurred at Wheeler's bridge, which passes over the tracks of the defendant about three miles west of Rome. The distance from the top of the rail to the bottom of the bridge was, until a recent change, about seventeen feet, while the height of ordinary freight cars is ten feet and nine inches, and of refrigerator cars twelve feet and five inches. On the 11th of November, 1887, the plaintiff's intestate was acting as head brakeman on a freight train composed of twenty-nine refrigerator and three ordinary freight cars. It was his first trip as brakeman, and he had passed but once before under Wheeler's bridge, which had no warning signals on either side to notify trainmen of danger. The rules of the defendant required conductors to see that the men employed upon trains were at their posts upon descending grades, and not to allow their trains to acquire a greater speed than one mile in four minutes; and it was the duty of the head brakeman to keep watch of the train so as to see that it did not break apart. As the train approached Wheeler's bridge from the west on a grade descending to the east, running at the rate of twenty miles an hour, on a dark, stormy morning, the intestate, no signal for brakes having been given, left the cab without taking his lantern, and climbed upon the top of the car next to the engine. He was seen standing upon that car shortly before the train passed under the bridge and immediately thereafter he was found lying on top of the same car very near the centre, insensible, and in a short time he died. No evidence was given as to the cause of death, other than the facts already stated, and when the plaintiff rested, as well as at the close of the evidence, the defendant moved for a nonsuit upon the ground, among others, that the evidence failed to show that the death of the intestate was caused by the negligence of the defendant. The motion was denied, the defendant excepted, and now urges the failure of

the plaintiff to connect the death of the decedent with the omission to erect warning signals as the main ground for asking a new trial.

In an action to recover damages for negligence, the burden is upon the plaintiff to establish by a fair preponderance of evidence every fact that is essential to his cause of action. It is not enough to show that the defendant was negligent and that the plaintiff was free from negligence, but it is also necessary to show that the negligence of the defendant caused the injury for which a recovery is sought. The negligence must be connected with the injury by natural and uninterrupted sequence, as cause is connected with effect. While direct evidence is not essential, the circumstances must be such as to fairly permit the inference that the negligent condition or act contributed so proximately to the injury that without its agency the accident would not have happened.

Upon the trial of this action the plaintiff failed to meet the burden of proof that the law thus cast upon him by showing that the death of his intestate was caused by contact with the bridge. He did not even show that the deceased was of such a height that, standing erect upon the car, he could have been struck by the bridge. Assuming that in the absence of proof upon the subject, the jury would have been justified in finding that he was of the average height of men, still there was no evidence to warrant the conclusion that any part of his body was hit by the bridge. (*Hunter v. N. Y. C. & W. R. R. Co.*, 116 N. Y. 615.) No evidence was given tending to show any wound or bruise upon his person, or that he died from violence instead of disease. For aught that appeared his death might have been owing to some natural cause, such as apoplexy or heart disease. The mere coincidence of his death with the time of passing under the bridge, does not satisfy the burden of proof, under the circumstances of this case, for the evidence is to be considered with reference to the ability of the one side to produce and of the other to contradict. While it is true that slender evidence is sometimes permitted to become the basis

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of a finding of fact, it is when it appears that there is no more to be had, and it is allowed under the necessity of the case in order to prevent injustice. No such necessity existed upon the trial under review, for it appeared that a coroner's inquest was held, and the plaintiff, who was the father of the deceased, testified that he attended his funeral. No reason was given for not showing the cause of death or the appearance of the body, and, under such circumstances, it must be presumed that it was within the power of the plaintiff to show, if such were the fact, the existence of fresh wounds sufficient to cause death, and of such a nature as to have been inflicted by striking the bridge. Nothing of the kind was shown, doubtless through inadvertence upon the first trial, and, possibly, through the absence of witnesses upon the second, when the printed testimony was read from an appeal book. The case was not tried upon the assumption by both parties that the injury was owing to the bridge, for the counsel for the defendant, as the case shows, openly contended that there was no proof that the deceased met his death in the manner alleged or through the agency of the defendant. The plaintiff, having shown that his intestate might have been struck by the bridge, and that, although apparently well just before, he was in a dying condition just after passing under it, went no farther in his proof, but asked the jury to find from those facts that the death was owing to the bridge. We are of the opinion that this was not enough, under the circumstances, and that it was incumbent upon him to produce further evidence, or, at least, to show that no more could be had, after due effort to procure it.

The judgment should be reversed and a new trial granted, with costs to abide event.

All concur, except MARTIN, J., not sitting.

Judgment reversed.

In the Matter of THE UTICA NATIONAL BREWING COMPANY, a
Dissolved Corporation.

ELLA M. WILLCOX, as Executrix of WILLIAM C. WILLCOX,
Deceased, et al., Appellants; WILLIAM F. WELCH et al.,
Respondents.

1. **PROMISSORY NOTES — RENEWAL.** Whether the taking of a renewal note, by a bank, is in payment, or merely in extension, of the obligation represented by the previous note, depends upon the intention of the parties, as manifested by the facts and circumstances attending the transaction.

2. **AVOIDANCE OF PRESUMPTION OF PAYMENT.** A conclusive finding, that there was no intention on the part of any of the parties to renewal notes taken by a bank, or on the part of the bank, to pay the former notes, or that the taking of the new notes was to have the effect of such payment, but that, on the contrary, it was the intention of all parties to extend the time of payment of the former notes by renewals thereof, destroys whatever presumption of payment might arise from the taking of the renewal notes.

3. **CONSOLIDATED CORPORATION — DISSOLUTION — LIABILITY FOR RENEWAL NOTE OF CONSTITUENT CORPORATION.** Where, at the time of the consolidation of business corporations under the statute (L. 1892, ch. 691, § 8 *et seq.*), they are severally indebted to a bank upon promissory notes, and the notes mature and are renewed by notes of the same amounts and tenor after the consolidation, which new notes are held by the bank at the time of the commencement of a proceeding for the voluntary dissolution of the consolidated corporation, their payment as a claim against the consolidated corporation cannot be defeated on the ground that the taking of the renewal notes after the consolidation paid the notes which were outstanding against the constituent corporations at the time of their consolidation and discharged the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations, where it is established as a fact that the taking of the renewal notes was not intended by any of the parties to the notes or to the transaction as a payment, but merely as an extension, of the original obligations.

4. **JUDGMENT AGAINST CONSTITUENT CORPORATION.** Nor, in such case, does the fact that the creditor bank has reduced the liability of the constituent corporations, upon the notes held by it, to judgment discharge the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations.

5. **CONCURRENT REMEDIES.** Under the statute (L. 1892, ch. 691, § 12), the pursuit, by the creditor of a corporation which has entered into a

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consolidation, of a remedy against his original debtor presents no legal obstacle to an effort to collect his debt from the consolidated corporation.

6. AGREEMENT BETWEEN CORPORATIONS — CREDITORS. The statutory liability of a consolidated corporation for the debts and liabilities of its constituent corporations, cannot be impaired by any agreement between the corporations, as to creditors who have not joined in or assented to the agreement.

7. UNAUTHORIZED SALE OF TREASURY STOCK BY MANAGING STOCKHOLDER — LIABILITY FOR PROCEEDS. . Where an agreement for the consolidation of corporations, under the statute, signed by all the stockholders, and providing for a distribution among them of the common stock and a portion of the preferred stock, provides that the rest of the preferred stock shall belong to the treasury of the consolidated corporation, to be disposed of only on the order of the board of directors, and one of the stockholders, having practical control of the consolidated corporation, sells some of its treasury stock without any resolution of the directors authorizing it, and pays a part of the proceeds over to the corporation, the payment may be deemed a recognition by him of a liability to account for the proceeds of all the treasury stock so sold by him, and warrants the setting off of the balance of such proceeds against a note made by one of the constituent corporations, held by him.

8. AGREEMENT AS TO CORPORATE DEBTS — STOCKHOLDERS. A provision in an agreement for the consolidation of corporations, under the statute, signed by the stockholders, to the effect that the consolidated corporation shall owe no debts on account of the constituent corporations, while it cannot affect the rights of outside creditors is a bar to the claim of a signing stockholder to payment from the assets of the consolidated corporation, in case of its insolvency, of an obligation of a constituent corporation held by him.

Matter of Utica National Brewing Co., 19 App. Div. 627, affirmed.

(Argued October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 28, 1897, which affirmed an order of Special Term confirming the report of a referee appointed to pass upon the final account of the receiver of an insolvent corporation, and to take evidence and report as to certain disputed claims.

The facts, so far as material, are stated in the opinion.

P. C. J. De Angelis for appellants. Upon the assumption that the indebtedness held by Mr. Welch as assignee is an indebtedness of the new corporation, we insist that the claim

of the executrix should be allowed, both upon the \$6,000 note and upon the account. (*P. Ins. Co. v. Church*, 81 N. Y. 218.)

William Kernan for respondents. The report of the referee, and the order confirming the same, are *res adjudicata* as to the validity of the claim of the First National Bank, assigned to Welch. (*Harris v. Harris*, 36 Barb. 88; *Lythgoe v. Lythgoe*, 75 Hun, 147; *Clemens v. Clemens*, 37 N. Y. 59; *Dolan v. Mayor, etc.*, 62 N. Y. 472; *C. P. P. & M. Co. v. Walker*, 114 N. Y. 7; *Demarest v. Darg*, 32 N. Y. 281; *Aldridge v. Walker*, 73 Hun, 281; *Milbank v. Jones*, 2 Misc. Rep. 503; *McRoberts v. Pooley*, 12 Civ. Pro. Rep. 139; *Dwight v. St. John*, 25 N. Y. 203; *Leavitt v. Wolcott*, 95 N. Y. 212; *Culross v. Gibbons*, 130 N. Y. 447.) The taking by the bank of renewal notes from the old companies subsequent to the consolidation in no way affected the debt of the bank, either against the old or the new companies. (Edwards on Bills & Prom. Notes, 192, 193; *First Nat. Bank v. Morgan*, 6 Hun, 346; *H. T. Co. v. Waddell*, 75 Hun, 104, 113; *Bates v. Rosekrans*, 37 N. Y. 410; *Winsted Bank v. Webb*, 39 N. Y. 325; *Clafflin v. Ostrom*, 54 N. Y. 582; *J. I. Co. v. Walker*, 76 N. Y. 521; *Nat. Bank of Newburgh v. Bigler*, 83 N. Y. 52.) The judgments obtained by the bank against the old companies upon the notes in no way affected the bank's rights as creditor against the new company. (L. 1892, ch. 691, § 12; *Prouty v. L. S. & M. S. R. Co.*, 52 N. Y. 363; *Bourdman v. L. S. & M. S. R. Co.*, 84 N. Y. 157; *Gambling v. Haight*, 59 N. Y. 354; *R. & E. M. Co. v. Carpenter*, 5 Hun, 162; *C. E. Ins. Co. v. Babcock*, 57 Barb. 231; *F. Nat. Bank v. Morgan*, 6 Hun, 346.) The referee was right in disallowing the claim of the estate of William C. Willcox. (Bigelow on Est. [4th ed.] 558; *Smith v. Felton*, 43 N. Y. 419; *Davidson v. Alfaro*, 80 N. Y. 660; *Coffin v. McLean*, 80 N. Y. 560; *Littlefield v. Albany Co. Bank*, 97 N. Y. 581; *Acer v. Hotchkiss*, 97 N. Y. 395, 408; *Wood v. Livingston*, 11 Johns. 36.) If the estate of Willcox and the executrix thereof are not barred and estopped by the said consolidation

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agreement from claiming this note for \$6,000 and interest, still they are not entitled to anything on such note or on the account of the said Willcox on the books of the company. (Code Civ. Pro. § 505; *Mowry v. Peet*, 13 Wkly. Dig. 16; *Smith v. Felton*, 43 N. Y. 419; *Hughitt v. Hayes*, 136 N. Y. 163.)

GRAY, J. Upon the final accounting of the receiver of the Utica National Brewing Company, it was referred to a referee to report as to certain disputed claims, among other things, and this appeal brings up for our review the correctness of his report as to the claims presented by the First National Bank of Utica and by the estate of William C. Willcox, deceased. The first of these claims was allowed by the referee; but the other he disallowed and his disposition of both has been approved by the courts below. The executrix of William C. Willcox now appeals to this court from the disposition so made.

The Utica National Brewing Company was formed in May, 1893, by the consolidation of two corporations, known as the National Brewing Company and the Utica Brewing Company. At the time of this consolidation, these companies were indebted to the First National Bank of Utica upon several promissory notes, payable to the order of William C. Willcox and indorsed by him, aggregating in amount the sum of \$47,962. These notes severally matured subsequent to the consolidation; but they were renewed, some two and some three times, by the giving of new notes for the same amount and of like tenor. These renewal notes were held by the bank at the time when this proceeding for the voluntary dissolution of the new company was commenced. Subsequently, the bank recovered judgments against each of the two companies upon the notes it held and it has assigned its claim against the estate in the hands of the receiver of the new company to William F. Welch, respondent here.

The objection was made to the claim of the bank, as presented to the receiver, that the taking of the renewal notes,

after the consolidation was effected, and the incidental transactions connected therewith, and the reduction to judgment against the consolidating companies of their liability upon the notes constituted, in legal effect, a discharge of the consolidated company from its statutory liability for the payment of the debts of those companies. It was claimed that the notes which were outstanding against the constituent companies, at the time of their consolidation, were in fact paid.

Whether the taking of the renewal notes was in payment, or in discharge, of the obligation represented by the previous notes was a question to be answered by ascertaining the intention of the parties, as manifested by the facts and circumstances attending their transactions, and we have an explicit finding of fact by the referee upon the subject. He found that there was no intention on the part of the makers or indorsers of said notes, or on the part of the bank, to pay the former notes, or that the taking of said new notes was to have the effect of such payment; but that, on the contrary, it was the intention of all the parties to extend the time of payment of said notes by renewals thereof. His finding is supported by the evidence and, with the unanimous affirmance by the Appellate Division, now becomes conclusive upon the question. It destroys whatever presumption of payment might arise from the taking of the renewal notes. (*National Bank of Newburgh v. Bigler*, 83 N. Y. 51.) The operation of the renewal notes was to further extend the time of payment of the obligation and to evidence its continued existence. The evidence must be regarded as having negatived the idea of any agreement that the new promises to pay should be equivalent to payment. (*Jagger Iron Co. v. Walker*, 76 N. Y. 521.) The *Phoenix Insurance Co.'s Case* (81 N. Y. 218), does not deny the general rule. In the opinion it is observed, but only in passing, that by common understanding and usage the transaction of discounting a note, to take up a prior note held by the bank, and the crediting of the avails to the party, might be regarded as an extinguishment of the prior note. There is no such element of usage here.

Nor did the recovery of the judgments upon the notes affect the creditor's rights against the new company. Their effect was, simply, to effect a change in the form of its liability to its creditor. It was open to the creditor, under the provisions of the statute, pursuant to which the consolidation of the companies was effected, (Chap. 691, Laws of 1892), to enforce the liability, either against the corporation whose debt it was, or against the new corporation whose debt it became under the statute, which made it liable to pay and discharge all the liabilities of each of the corporations consolidated. (Sec. 12.) The very purpose of this statute, while permitting companies to consolidate themselves into a single corporation, was to preserve to the creditor all his rights, unimpaired by what was done, and its operation is to furnish to him remedies, necessarily, concurrent in their nature. The creditor's pursuit of a remedy against his original debtor presents no legal obstacle to his effort to collect his debt from the new company.

It is argued, however, in effect, that by the terms of the consolidation agreement the new corporation was freed from the debts and liabilities of the corporations merging into it. If we might assume that such was intended as a result of consolidation under the agreement, nevertheless, it would be wholly inoperative to accomplish any such thing as to creditors who were not parties to the agreement. Such creditors were not bound by any of its provisions. The statute protected them and consolidation pursuant to its permission and provisions, whatever it may mean for the stockholders because of their agreement, leaves the creditors precisely in the situation which the statute defines. If they have not done anything to impair or to release their rights, it is not, and could not be, within the purview of the statute that those rights may be impaired through the action of members of the consolidating corporations.

The suggestion that the bank here was chargeable with knowledge as to what the arrangement was for the consolidation of the companies, and, therefore, that it could not, in good

faith, assert its claim against the new company, is without any force or reason, in our judgment, and needs no discussion.

The claim presented by the executrix of William C. Willcox against the estate in the hands of the receiver, so far as this appeal is concerned, is founded upon a promissory note, made by the National Brewing Company in June, 1893, to the order of William C. Willcox for \$6,000 and interest. Objection was made to this claim, and it is argued that, as a debt of one of the constituent companies of which Willcox was president and a stockholder and a director, it was discharged by virtue of that clause of the consolidation agreement which provided, among other things, that the property and stock of the constituent companies should be transferred to the new company and be owned by it, "free and clear from all incumbrances, equities or debts, and that the said consolidated corporation should at its inception owe no debts for or on account of any of the business or property of the said constituent companies." The operation of this provision, it was argued, was that the stockholders who signed the agreement of consolidation became personally answerable to indemnify the consolidated company against the liabilities of the constituent companies.

The consolidation agreement is clumsily expressed, and its meaning is not altogether clear; but we are concerned rather with its effect upon the claim in question and not with the question of whether it militates against any purpose of the statute. It purports to be the agreement of the stockholders, as well as of the directors, and it appears that the latter were the owners of all of the stock of the consolidating companies. While it provides that of the \$160,000 of capital stock of the new company, \$80,000 is to be paid to each company, this general provision is subsequently qualified by the definition of the manner of distribution of the new capital. It is divided into \$60,000 of preferred stock and \$100,000 of common stock. The common stock is to be distributed wholly among certain named subscribers (who are, in fact, the old directors and stockholders), and of the preferred stock \$20,000 is to be distributed to certain two of those parties, Willcox and

McNeirney, as subscribers, who took each \$10,000 ; leaving, to quote from the agreement, "unsubscribed for \$40,000, which shall belong in the treasury of the said consolidated corporation and shall be offered, sold or disposed of, at not less than cost, according to the direction and order of the said board of directors." That only \$120,000, in amount, of the new capitalization was to be allotted to the persons who composed the body of the former stockholders, is made evident by a later clause, which provides that the subscriptions for "\$100,000, the full amount of the common stock of said company, and \$20,000 of said * * * preferred stock, shall be hereby made and subscribed as cash subscriptions," etc.

It may be inferred from this agreement that the stockholders of the constituent companies devised a scheme or transaction for a division among themselves of \$120,000 of the stock of the new corporation and that it was proposed by the sale of \$40,000, in amount, of preferred stock to furnish the treasury of the corporation with a working capital. It was, evidently not intended that the new company should be put in possession of funds from the subscriptions for the \$100,000 of common stock and the \$20,000 of preferred stock ; inasmuch as by a peculiar, and not very intelligible provision, of the agreement the new company was to pay for the property transferred, in cash or by its check, "to each of said parties for the amount of their respective shares or considerations and that thereby the said subscriptions unto the said capital stock, etc., shall be hereby made as cash subscriptions." It is immaterial to the present discussion that the subscribers to the common stock and to the \$20,000 of preferred stock were not to make any actual payment of money into the company's treasury, or that there was a contrivance to make it appear that there was a purchase of corporate properties, at a certain figure of valuation, without any money actually passing. The fact is that \$40,000 of preferred stock was to belong to the new treasury, to be disposed of only according to the order of the board of directors. Now the finding of the referee is that Willcox sold preferred stock in the treasury of

the new company to an amount equal to \$17,766.66, without any resolution of the board of directors directing the same, and that, being practically in control of the company, he had assumed the responsibility of issuing that amount of stock. Of the proceeds of the sales of the preferred stock, he paid into the company and received credit for, by his own direction, the sum of \$8,100. The referee construed Willcox's conduct, in thus turning the proceeds of the sale of the stock into the company, as implying the right of the company to them, and he held that he should account for the whole of the sale as the property of the company. This view resulted in the surcharging of Willcox's account upon the company's books with the \$17,666.66 and in leaving a balance due from him of upwards of \$9,000, or more than enough to extinguish the amount claimed by his executrix upon the note for \$6,000. The referee's ground for disallowance of the Willcox claim is, in our judgment, perfectly sound. Willcox could not dispose of the treasury stock, in the absence of some warrant from the board of directors, without rendering himself liable to account for the proceeds, and this liability seems to have been fully recognized by him in his direction that his account should be credited with that portion of the proceeds which he had paid in.

There is another view of the case, which militates against this claim, and that is that, under the circumstances, Willcox would have been, and his estate is, barred from collecting it from the new corporation. He was a party to the agreement of consolidation, not merely as a director of the constituent companies, but also as a stockholder, and one of the clauses provided, as it has been above mentioned, that the new company should owe no debts on account of any of the business of the constituent companies. This was, in effect, the agreement of the parties who were organizing the consolidated company, and who were to receive all the benefits which consolidation might bring, that the new company should owe no debts on account of the old corporations. It amounted to an agreement of indemnity on their part, and Willcox

N. Y. Rep.] Opinion of the Court, per GRAY, J.

was bound by it, quite as much as though he had been a party to it merely in his individual capacity. In the consolidation of corporations, pursuant to the provisions of the statute, the new corporation starts upon its existence freighted with the liabilities of the old companies and subject to the terms and conditions of the consolidation agreement, so far as they are not in conflict with the law. While it is not competent to do anything which would impair the rights of outside creditors, there is no reason why the parties to the consolidation agreement may not bind themselves to something deemed for the benefit of the new corporation, and that is what seems to have been done in the present case. The manifest intention of the stockholders of the old companies, who united in making and signing the consolidation agreement, seems to have been to represent that their corporate properties and franchises vested in the new company freed from any burden of indebtedness. As to creditors not assenting to any such arrangement, this was quite unavailing; but as to themselves it should, and would, operate to bar their claims, while the other creditors were seeking payment from the assets of the corporation since become insolvent. The appellant cannot be heard to complain of the justice of this reading of the representation in the consolidation agreement.

Upon all of the grounds discussed in this opinion, the order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

154	278
s 155	625
154	278
156	698
154	278
158	600
f 158	690
f 158	692
f 158	699
154	278
162	445
154	278
163	525
154	278
168	1471

PETER HENAVIE, as Administrator of PATRICK HENAVIE,
Deceased, Appellant, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Respondent.

1. APPEAL FROM REVERSAL OF JUDGMENT ON VERDICT. An appeal does not lie to the Court of Appeals from a judgment of an Appellate Division of the Supreme Court, reversing a judgment and order and granting a new trial, when the appeal to the Appellate Division was not only from a judgment entered upon the verdict of a jury, but also from an order denying a motion for a new trial upon the ground that the verdict was against the weight of evidence, and the order of reversal does not state whether it was upon the law or facts, or both.

2. CODE CIV. PRO. § 1338 — AMENDMENT — JURY TRIAL. The substitution of the words "a determination in the trial court" for the words "a decision of the trial court upon a trial without a jury," in section 1338 of the Code of Civil Procedure, by the amendment of 1895 (Ch. 946), did not extend the right of review by the Court of Appeals of a reversal of a judgment entered upon the verdict of a jury.

Henavie v. N. Y. C. & H. R. R. R. Co., 10 App. Div. 64, appeal dismissed.

(Argued October 19, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 30, 1896, reversing a judgment in favor of the plaintiff entered on the verdict of a jury.

This action was tried before a jury and resulted in a verdict for the plaintiff. The defendant thereupon moved for a new trial upon the ground, among others, that the verdict was contrary to the evidence, but the motion was denied, and an appeal from the order entered accordingly, as well as from the judgment entered upon the verdict, was taken to the Appellate Division, which reversed both judgment and order and granted a new trial, without specifying whether it was upon the law or facts, or both. The plaintiff thereupon appealed to this court, giving the usual stipulation, but, upon the argument, discussion of the merits was suspended in order to first determine whether this court can entertain an appeal taken under such circumstances.

N. Y. Rep.] Opinion of the Court, per VANN, J.

M. P. O'Connor for appellant. The order of the Appellate Division granting a new trial is appealable. (Const. N. Y. art. 6, § 9; Code Civ. Pro. §§ 1337, 1338.) The order in this case is silent on the ground of reversal. It was, therefore, not a reversal on the facts and is appealable. (Code Civ. Pro. §§ 190, 1337; L. 1895, ch. 946; *Otten v. M. R. Co.*, 150 N. Y. 395; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 219; Sedgw. on Stat. Cons. [2d ed.] 365; *Rich v. Keyser*, 54 Penn. St. 86.)

Daniel W. Tears for respondent. An order of the Appellate Division which reverses an order of the trial court in an action tried by a jury, denying a motion made on the minutes to set aside a verdict and grant a new trial, and grants a new trial, where the facts were before the Appellate Division with power to grant a new trial on the facts, is not appealable to the Court of Appeals. (*Harris v. Burdett*, 73 N. Y. 136; *Snebley v. Conner*, 78 N. Y. 218; *Chapman v. Comstock*, 134 N. Y. 509; *Mickee v. W. M. & R. M. Co.*, 144 N. Y. 613; *Hoes v. Edison G. E. Co.*, 150 N. Y. 87.)

VANN, J. The question presented for review is, whether an appeal lies to this court from a judgment of an Appellate Division of the Supreme Court, reversing a judgment and order and granting a new trial, when the appeal to that court was not only from a judgment entered upon the verdict of a jury, but also from an order denying a motion for a new trial upon the ground that the verdict was against the weight of evidence. The decision of this question depends upon the construction of section 1338 of the Code of Civil Procedure, as amended by chapter 946 of the Laws of 1895. Prior to that amendment the section was in these words: "Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon a referee's report, or a decision of the court, upon a trial without a jury; or from an order granting a new trial, upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon

a question of fact, unless the contrary clearly appears in the body of the judgment or order appealed from. In that case, the Court of Appeals must review the determination of the General Term of the court below, upon the questions of fact, as well as the questions of law."

Under the section as it then stood, when the appeal to the General Term was from both the judgment and the order, the presumption that the reversal was based upon the law, unless the contrary appeared by the record, did not extend to a judgment entered upon a verdict, and hence it was repeatedly held that in such a case, where there was a conflict of evidence so that the reversal might have been based upon the facts, an appeal could not be taken to this court unless it appeared that the order was affirmed as to the facts or the appeal therefrom was dismissed, "because it might result in depriving the party against whom the judgment at circuit was rendered of the review by the General Term of the facts to which the law entitles him." (*Williams v. D., L. & W. R. R. Co.*, 127 N. Y. 643; *Chapman v. Comstock*, 134 N. Y. 509.)

In 1895 said section was amended so as to read as follows: "Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon the report of a referee or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be presumed that the judgment was not reversed, or the new trial granted upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from."

It is argued by the appellant that the change in language is not formal, but substantial, and indicates an intention to change the procedure so as to assimilate the practice in actions tried before a jury to that in actions tried before a referee or before the court without a jury. It is insisted that the expression "a determination in the trial court" is stronger than if the section said "a decision of the trial court," and that it is strong enough to embrace the verdict

of a jury as one of the methods of determination intended by the legislature. This reasoning is not without force and might be controlling if section 1338 alone had been changed by the act which amended it, as that would be a special enactment, having, presumptively, a special purpose, but this was not the fact. Owing to the adoption of the new Constitution it became necessary to revise the Code of Civil Procedure so as to adapt it to the changes made in the fundamental law, and accordingly we find that section 1338 was only one of two hundred and twenty-five sections that were amended by the same act, not including seventy-one sections that were repealed outright. (L. 1895, ch. 946.) Under these circumstances, a change in the manner of expression does not necessarily indicate a change in meaning, for the rule in the case of a revision of statutes is that where the law, as it previously stood, was settled either by adjudication or by frequent application of the statute without question, a mere change in the phraseology is not to be construed as a change in the law, unless the purpose of the legislature to work a change is clear and obvious. (*Taylor v. Delancy*, 2 Cai. Cas. 142, 151; *Goodell v. Jackson*, 20 John. 693, 722; *Matter of Brown*, 21 Wend. 316, 319; *Theriat v. Hart*, 2 Hill, 380; *Gaffney v. Colvill*, 6 Hill, 567, 574; *Croswell v. Crane*, 7 Barb. 191, 195; *Hughes v. Farrar*, 45 Me. 72.) An examination of the different sections of the Code that were revised by the act under consideration shows many changes in phraseology that were obviously made for the sake of brevity, or clearness, or what was supposed to be an improvement in the form of expression. Thus, in the very sentence of section 1338, now under review, we find an example of the latter in the substitution of the words "the report of a referee," for "a referee's report." Here, clearly, there was no change in meaning, but simply a change in the style of expression, with the object of reforming the language. An effort to improve in clearness appears in the last clause of the same sentence, where "the body of the judgment" is converted into "the record body of the judgment." The changes made by said statute, having no apparent purpose

except to promote conciseness, are too numerous to admit of specification. If it was the intention of the legislature to place all appeals upon the same footing, so far as the section relating to presumptions is concerned, there was no necessity of specifying the different kinds of judgments by referring to what they were entered upon. If all were to be included, both clearness and brevity would have been promoted by saying so, and omitting the enumeration as superfluous. But if any enumeration were to be made, so radical a change in the practice, which, after much litigation, was definitely settled and well understood, as the inclusion of a judgment entered upon a verdict, would ordinarily be set forth clearly and specifically, rather than concealed under a doubtful generality. The expression, "a determination in the trial court," obviously includes "a decision of the court upon a trial without a jury," but, according to common parlance and the general understanding, would not include the verdict of a jury. (Code Civ. Pro. § 3343.) It would be a peculiar, if not an unprecedented definition, to describe the verdict of a jury as a determination in a trial court. Neither lawyers nor legislators have been accustomed to so express themselves, for whatever the legal theory may be, in fact the verdict of a jury is commonly spoken of and regarded as a determination made out of court and reported to the court. When a statute relating to procedure is satisfied by a construction which, when based on the ordinary signification of language, accords with the established practice, it should not be so construed as to disrupt that practice, when, in order to do so, a strange and unusual, although, perhaps, a permissible, meaning must be given to the words used.

We are of the opinion, therefore, that the practice has not been changed by recent legislation, so far as the question discussed is concerned, and that the appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

MATILDA E. GOODWIN, Individually and as Sole Surviving Executrix of MATILDA E. CODDINGTON, Deceased, Respondent, v. EMILY M. CODDINGTON, Appellant, Impleaded with GILBERT S. CODDINGTON et al.

154	283
156	485
154	283
166	408
154	283
167	493
154	283
78	AD*612

1. WILL—CONSTRUCTION. Where the language of a codicil is not plain, or its meaning is doubtful, an interpretation that excludes issue from a vested remainder originally limited by the will upon the life estate of a parent, or prevents the issue of a deceased child from participation in the estate, is not favored.

2. PRESERVATION OF REMAINDER TO ISSUE OF DECEASED CHILD. Where a will gives a share of the estate to a child for life, with remainder over to his issue, if any, and the child dies before the testator, leaving issue, a codicil dealing with the share so originally devised should, if it and the will are reasonably capable of such an interpretation, be construed as continuing the remainder in the issue of the deceased child; and if the codicil imposes some disposition of such share to others, a reasonable construction, limiting such disposition to the substitution of life tenants only, is to be preferred.

Goodwin v. Coddington, 84 Hun, 605, reversed.

(Argued October 25, 1897; decided November 23, 1897.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, entered February 7, 1895, which overruled exceptions to a decision of the court on trial at Special Term, upon which an interlocutory judgment was entered in favor of plaintiff November 13, 1894, and denied a motion for a new trial under section 1001 of the Code of Civil Procedure.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward S. Rapallo for appellant. The intention of the testatrix in the 2d clause of the 3d codicil was merely to devise life estates to her own surviving children in the one-fifth originally given to Jefferson for life, and not to disturb the remainders vested in fee in Jefferson's children, nor to disinherit Jefferson's two children. (*Viele v. Keeler*, 129 N. Y. 199; *Redfield v. Redfield*, 126 N. Y. 466; *Byrnes v. Stilwell*, 103 N. Y. 453; *Hard v. Ashley*, 117 N. Y. 606; *Rose-*

boom v. Roseboom, 81 N. Y. 356; *Clarke v. Leupp*, 88 N. Y. 228; *Freeman v. Coit*, 96 N. Y. 63; *Taggart v. Murray*, 53 N. Y. 233; *Van Vechten v. Keator*, 63 N. Y. 52; *Stokes v. Weston*, 142 N. Y. 433.)

Herbert J. Bickford and Treadwell Cleveland for respondent.

O'BRIEN, J. This action was brought to procure a judicial construction of the will of Matilda E. Coddington, who died in the year 1882, leaving a will dated in 1869, with codicils, the last of which was made in 1876. Among the property owned by the testatrix at the time of her death was a three-fourths interest in certain real estate at No. 17 Wall street in the city of New York, which was disposed of by the following clause of the will:

"I give, devise and bequeath to my children, Jefferson, Gilbert S., Clifford, Matilda E., and Louisa, each an undivided fifth part of all my interest in the building and lot known as Number 17 (seventeen) Wall street, in the city of New York, being an undivided three-fourths thereof, for the term of his or her natural life, and after his or her death, I give the same to his or her children, the issue of any deceased child, if any, to take its parent's share. Should either of my said sons die leaving no issue him surviving, I give, devise and bequeath his one-fifth of said premises to such of his above mentioned brothers and sisters, if any, as may be then living, and the issue of any deceased brother or sister above mentioned, if any, such issue to take the share its parent would have taken if living.

"If either of my said daughters should die without leaving issue her surviving, I give her one-fifth of said premises to my granddaughter, Mary Matilda Moore, for her life, and after her death to her issue, if any. If none, to such of my said sons and daughters, if any, as may then be living, and the issue, if any, of any deceased son or daughter above mentioned, such issue to take its parent's share."

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

Jefferson Coddington, one of the sons mentioned in this devise, died in 1876, before the testatrix, leaving two children, one of whom is the party who brings this appeal. In August, 1876, after his death, the testatrix by a codicil to her will substituted in the place of the life estate devised to him in the will, a life estate in each of her surviving children. The question in this case is how far and to what extent this codicil changed the other dispositions in the will with respect to the real estate described therein. The codicil is as follows:

"*Second.* That the one-fifth part of my interest in the premises No. 17 Wall street, which in and by said will I devised to my said son Jefferson, his issue, etc., shall be divided into four equal parts, one of which parts I give and bequeath to each of my now surviving children for and during the natural life of such child, and after his or her death to the same person or persons who under and by virtue of said will shall be entitled to the remainder of the one-fifth therein devised for life to such child."

Since the death of the testatrix and the admission of the will to probate, two of the four children who survived her have died, namely, a son and a daughter, the former leaving issue but the latter without issue. The question is, who takes the remainders in the share originally devised to Jefferson for life, and which after his death was by the codicil devised to the four surviving children of the testatrix for life. By the original will, which devised one-fifth of the Wall street property to Jefferson for life, a remainder was to vest in his two children, and the decision of the courts below is to the effect that these remainders were divested by the codicil. That view doubtless receives very strong support from the grammatical construction of the language of the codicil. But the *intention* of the testatrix, as it appears from the whole instrument should prevail over mere forms of expression. The *general plan* of the will with reference to this property was to allow her own children to enjoy it for life, with remainders to her grandchildren and their issue corresponding to the proportionate interest of their parents.

Where an estate is devised by a will, as it was in this case, to the children of Jefferson Coddington, such a provision cannot be regarded as revoked by subsequent language, capable of other reasonable construction, or less clear and certain than the language of the devise or bequest.

Whenever the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention in that direction as the prior part does to make it. A codicil will not operate to revoke a previous devise or bequest beyond the clear import of the language used. Effect must be given, so far as possible, to all parts of the will, and when the several provisions can be reconciled consistently with the intentions of the testator, as they appear and may be gathered from the original instrument and codicil, that construction will be favored. An estate once devised, or an interest intended to be given, will not be sacrificed on the ground of repugnancy, when it is possible to reconcile the provisions supposed to be in conflict. (*Van Vechten v. Keator*, 63 N. Y. 55; *Taggart v. Murray*, 53 N. Y. 233; *Freeman v. Coit*, 96 N. Y. 63; *Roseboom v. Roseboom*, 81 N. Y. 356; *Clarke v. Leupp*, 88 N. Y. 228; *Hard v. Ashley*, 117 N. Y. 606; *Byrnes v. Stilwell*, 103 N. Y. 453; *Viele v. Keeler*, 129 N. Y. 199; *Redfield v. Redfield*, 126 N. Y. 466.)

Where the language is not clear, or where the meaning is doubtful, the courts will not favor an interpretation that revokes a devise once given; or disinherits an heir; or divests a remainder in fee once vested; or excludes issue from a remainder originally limited upon the life estate of a parent; or prevents the issue of a deceased child from participation in the distribution of the estate. (*Stokes v. Weston*, 142 N. Y. 433; *In re Brown*, 93 N. Y. 295; *Low v. Harmony*, 72 N. Y. 408; *Scott v. Guernsey*, 48 N. Y. 106.) The will in question should receive a construction in harmony with these rules; and if the will and codicil are reasonably capable of an interpretation that will continue the remainders in the children of Jefferson, according to the original plan of the deceased, that construction should be adopted.

We think that the testatrix did not intend to revoke that part of her will in which she devised to the children of Jefferson remainders limited upon his life estate. The purpose of the codicil was to substitute, after his death, the four surviving children, his brothers and sisters, to the life estate devised to him by the will. It was no part of the plan of the testatrix to change the disposition which she had already made of the remainders in the share of her deceased son. They had already vested under the will on its taking effect in his children, and no reason is apparent for withdrawing from them what had once been given. It is more reasonable to suppose that her intention was when executing the codicil to devise life estates to her own surviving children in the one-fifth originally given to the deceased son for life, and not to disturb the remainders in fee vested in his children, nor to disinherit them as to that part of her estate.

This construction is reasonable and just and warranted by the rules of law to which we have referred as applicable in the interpretation of the language of a testamentary instrument in which provisions of this character are expressed. It may not be the necessary construction, but it is enough if that meaning may reasonably be given to the words used. A construction more unfavorable to the claims of the children of Jefferson is possible by a close adherence to grammatical rules; but an intention on the part of the testatrix not to disturb what had been given them by the will is more reasonable and probable. It is not doing violence to the language of the testatrix to hold that the words "*such child*" at the end of the codicil referred to Jefferson, and if so the "person or persons who under and by virtue of said will shall be entitled to the remainder of the one-fifth," referred to his children. What the testatrix evidently meant was that her four surviving children should be substituted in the place of the one who had just died as to the life estate, and that his children should take the remainder under the codicil as they did under the original will, thus preserving the original plan of the will, except so far as a change was made necessary by death.

The whole question really resolves itself into the inquiry whether the testatrix by the codicil intended to substitute the issue of her four surviving children, as devisees of the remainder in Jefferson's share, in place of his own children. Such an intention on the part of the testatrix would constitute such a notable departure from the uniform plan of the will, as shown by the whole disposition, that it should not be imputed to her unless the language is open to no other construction.

In our opinion, the codicil is reasonably capable of the interpretation that the remainders devised to the children of Jefferson under the will have not been changed or divested, and so the contention in behalf of the infant defendant should prevail.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment and order reversed.

154	288
157	284
f157	675
154	288
d165	91
154	288
78 AD	37

HELEN MATTHEWS, Respondent and Appellant, v. FANNIE H. MATTHEWS, as Administratrix of HORACE MATTHEWS, Deceased, Appellant and Respondent.

1. STATUTE OF FRAUDS — PLEADING. The defense of the Statute of Frauds, to be available, must be pleaded.

2. ACTION ON ORAL CONTRACT. In an action on an oral contract within the Statute of Frauds, where the complaint does not disclose the nature of the contract, whether oral or written, the defendant must plead the statute in order to avail himself of the objection.

3. DENIAL OF CONTRACT. The mere denial, in the answer, of the contract alleged in the complaint, when the character of the contract is not disclosed, does not entitle the defendant to attack the validity of the contract under the Statute of Frauds, upon the trial.

4. CONSIDERATION. The breaking up of one's home, disposing of property at a sacrifice, removing to another locality, and there going into possession of another's premises and furnishing him with a home, at his request and direction, constitute a good consideration for a contract on the latter's part to convey his premises.

5. ACTION FOR DAMAGES FOR BREACH OF ORAL CONTRACT TO CONVEY REALTY. If, in an action for damages for breach of a contract to convey

N. Y. Rep.]

Statement of case.

reality, the complaint does not disclose whether the contract was oral or written, and the answer does not set up the Statute of Frauds, no objection to proof of an oral contract, or to the validity of such a contract, under the statute, can be raised by the defendant upon the trial; and if an oral contract, on a good consideration and to the effect alleged in the complaint, is proved, it will warrant a recovery of damages for non-performance the same as if it had been written.

Matthews v. Matthews, 8 App. Div. 616, reversed.

(Argued October 26, 1897; decided November 23, 1897.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 2, 1896, which modified and, as modified, affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages for the breach of an alleged contract, by which the defendant, Horace Matthews, agreed to transfer his property to the plaintiff and her husband, in consideration of their removing from Pierrepont, St. Lawrence county, to Keeseville, Clinton county, and going into possession of the defendant's house, lands and personal property, and there making a home for him for life. The complaint did not show whether the alleged contract was oral or written. The answer contained a general denial, but did not set up the Statute of Frauds. The trial court awarded the plaintiff \$947 and interest; the Appellate Division reduced the recovery to the sum of \$70, composed of items for certain repairs made for, and produce furnished to, the defendant. Subsequently to the argument in the Appellate Division, the defendant died, and the action was continued in the name of his administratrix.

Further facts are stated in the opinion.

C. C. Van Kirk for plaintiff. The contract set forth in the complaint and proved upon the trial is a valid contract for the purposes of this trial. (*Crane v. Powell*, 139 N. Y. 379; *Hamer v. Sidway*, 124 N. Y. 538; *Porter v. Wormser*, 94 N. Y. 431; *Wells v. Monihan*, 129 N. Y. 164; *Honsinger v. Mulford*, 90 Hun, 589.) The contract thus being valid (the defense of the statute having been waived), plaintiff stands

before this court in the same position as if the contract had been in writing, and is entitled to damages for breach of the contract. (*Burtis v. Thompson*, 42 N. Y. 246; Sedg. on Dam. [8th ed.] § 227; *Howard v. Daly*, 61 N. Y. 362.) The plaintiff having shown part performance and having taken possession of the premises under the contract and at the request of defendant's intestate, the contract is taken out of the operation of the Statute of Frauds. (*Miller v. Bull*, 64 N. Y. 286; *Young v. Overbaugh*, 145 N. Y. 158; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 34; *Sternberger v. McGovern*, 56 N. Y. 12; *Murtha v. Curley*, 90 N. Y. 372; *Bell v. Merrifield*, 109 N. Y. 202; *Buess v. Koch*, 10 Hun, 301; *Cuff v. Dorland*, 55 Barb. 481; *Lawrence v. S. L. R. Co.*, 36 Hun, 467.)

A. W. Boynton for defendant. The invalidity of the contract under which plaintiff claims to recover having been expressly decided by this court, the case is brought directly within the condemnation of the rule that no recovery can be based upon the breach of an invalid contract. (*Dung v. Parker*, 52 N. Y. 494; *Mills v. Gould*, 10 J. & S. 119; *Blumenthal v. Bloomingdale*, 100 N. Y. 558; *Lawrence v. Smith*, 27 How. Pr. 327; *Harsha v. Reid*, 45 N. Y. 415; *Baldwin v. Palmer*, 10 N. Y. 232; *Erben v. Lorillard*, 19 N. Y. 301; 2 Addison on Cont. 714; *Matthews v. Matthews*, 133 N. Y. 679; *Higgins v. D., L. & W. R. R. Co.*, 60 N. Y. 553; *McHenry v. Hazard*, 45 N. Y. 580.) The case of *Crane v. Powell* (139 N. Y. 379), and cases following it, do not sustain the decision in this case, since in that case there was no general denial in the answer, and no specific objection to the admission of the evidence when offered as there were in this.

Under a general denial the defendant must be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out her cause of action, and the plaintiff must be prepared to prove a valid contract if she expects to recover damages for the breach

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thereof; and her evidence, if objected to, must satisfy the requirements of the Statute of Frauds, or any other statute. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 354; *Simis v. Wissel*, 10 App. Div. 326; *Milbank v. Jones*, 127 N. Y. 376; *Arnold v. Angell*, 62 N. Y. 508; 20 Abb. [N. C.] 333; *Duffy v. O'Donovan*, 46 N. Y. 226; *Quackenbush v. Ehle*, 5 Barb. 469; *Robinson v. Raynor*, 28 N. Y. 494; *Shakespeare v. Markham*, 72 N. Y. 400; *Bonesteel v. Van Etten*, 20 Hun, 470.) It was error for the trial court to allow evidence of items of damages and services not pleaded in the complaint or mentioned in plaintiff's bill of particulars. (*Matthews v. Hubbard*, 47 N. Y. 428; Code Civ. Pro. § 531; *Southwick v. F. Nat. Bank*, 84 N. Y. 420; *Stevens v. Mayor, etc.*, 84 N. Y. 296.) It was error for the court to allow plaintiff interest. (*White v. Miller*, 78 N. Y. 396; *McMaster v. State*, 108 N. Y. 542; *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331.)

ANDREWS, Ch. J. Subsequently to the decision of the former appeal in this case (133 N. Y. 681), the case of *Crane v. Powell* (139 N. Y. 379) came before the court, in which the controverted question was whether, in an action on an oral contract, within the Statute of Frauds, where the complaint did not disclose the nature of the contract, whether oral or written, it was necessary for the defendant to plead the statute in order to avail himself of the objection. The question was distinctly decided in that case, and it was held that the statute was a defense, and unless pleaded was not available to the defendant to defeat the action. The case must be regarded as settling the law of this state upon a question upon which courts of different jurisdictions have differed in opinion. This court regarded the rule adopted in *Crane v. Powell* as sound in principle and as supported by the rule applied in analogous cases.

It is plain, upon the view that the Statute of Frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that

such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English Judicature Act, as amended in 1873 (38 & 39 Vict., ch. 77, rule 19), ordained that, "where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise," and in *Towle v. Topham* (37 L. T. [N. S.] 309), JESSEL, M. R., applied the rule to the pleadings in an equity case. The statutory rule enacted by the English Judicature Act was regarded by this court in *Crane v. Powell*, as declaring the true rule independently of statute.

The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the Statute of Frauds, and it could not be raised by objection on the trial, to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed. Regarding the agreement alleged and found in this case as one for the sale or conveyance to the plaintiff of the house and lot, and applying the rule established in *Crane v. Powell*, it is plain that it must be treated as a valid contract, and its breach by the original defendant (who has died since the last trial) as giving a right of action for damages, as if the contract had been written and not oral. The complaint alleged a contract founded on a good consideration, but did not allege whether it was oral or written. The defendant in his answer denied the making of the contract alleged, but did not plead the Statute of Frauds as a defense. On the trial the plaintiff proved an oral contract, to the effect stated in the complaint. The defendant objected that the oral contract was void by the Statute of Frauds, but the objection was over-

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ruled. There was no amendment of the pleadings, and the judge before whom the case was tried found that the plaintiff and her husband had, in fulfillment of the contract on their part, broken up their home in St. Lawrence county, and, at the defendant's request and by his direction, had disposed of their property there at a great sacrifice, and removed to Clinton county and taken possession of the house and lot and other lands of the defendant, and furnished him a home until, without fault on their part, the defendant ejected the plaintiff and her husband from the premises, and afterwards, before the commencement of the action, conveyed the house and lot to a stranger, thereby disabling himself from performing his contract to convey the house and lot to the plaintiff. The judge found that the plaintiff and her husband had in every substantial particular performed the contract on their part, and at all times had been ready and willing to perform the same. He awarded to the plaintiff damages in the sum of nine hundred and forty-seven dollars, with interest, which sum was two hundred and fifty dollars less than the conceded value of the house and lot, and was no more than the actual loss incurred by the plaintiff and her husband in the sale of their property in St. Lawrence county, the expense of removing to Clinton county, the value of repairs made by them on the defendant's buildings, and of services, board, &c. The plaintiff, in her original right and as assignee of her husband, represents the claims of both. It is not claimed that the damages awarded are excessive or that they exceed the true measure of damages, if the oral contract is to be treated as valid. It is insisted, however, that the decision of the case in this court on the former appeal (133 N. Y. 681) is a binding adjudication that the contract was invalid. But that decision was rendered before the case of *Crane v. Powell* had settled the rule in this state that the defense of the Statute of Frauds, to be available, must be pleaded. The defendant in his argument on the former appeal insisted upon the invalidity of the oral contract, and it was assumed by the court and by counsel that the defendant was in a position to avail himself of that

defense, unless there had been such part performance as in equity would take the case out of the statute. Upon the trial now under review the plaintiff relied upon the case of *Crane v. Powell*, and insisted that the question of the validity of the oral contract within the statute could not be raised by the defendant, and this contention was sustained by the court. We think the circumstances justified the learned judge in treating the question as *res nova*, unembarrassed by the former decision, and so treating it we are of opinion that the judgment of the Special Term was justified by the evidence and by the law, and that the modification made by the Appellate Division was erroneous.

The judgment of the Appellate Division should, therefore, be reversed, and the judgment of the Special Term affirmed.

All concur.

Judgment reversed. _____

MARY KATZ, as Executrix of ABRAHAM KATZ, Deceased, and
LOUIS MAIER, Respondents, v. JOSEPH KAISER, Appellant.

1. REAL ESTATE — ENCROACHMENT OF BUILDING — EVIDENCE. The evidence as to the fact of encroachment upon adjacent premises by a building examined and held to support a finding that there was no encroachment.

2. ENCROACHMENT — COMMON OWNERSHIP — EASEMENT. If the owner of a lot on which there is a building whose wall encroaches upon the adjoining lot acquires title to the adjoining lot, the encroachment ceases; and if he subsequently severs the title to the lots, the adjoining lot is charged with the servitude of the wall, and the title to the dominant lot is not open to the objection that it encroaches upon the adjoining lot.

3. PRACTICAL LOCATION OF BOUNDARIES. A practical location of boundaries, which has been acquiesced in for a long series of years, will not be disturbed.

4. VARIANCE IN DESCRIPTIONS — BOUNDARIES CONFIRMED BY PRACTICAL LOCATION AND COVENANTS IN MORTGAGE. If the owner of a lot makes a practical location of its side boundaries by erecting a building which covers its entire width as described in his deed, and thereafter executes a mortgage, with covenants, intended to cover the entire lot, but which for some unexplained reason describes it as a few inches narrower than described in his deed, such practical location, and the covenants in the mortgage, may be successfully invoked, as against the original owner and

mortgagor and his heirs, to extend to the entire original lot a title acquired through a foreclosure sale, after the practical location has been acquiesced in for between thirty and forty years.

Katz v. Kaiser, 10 App. Div. 187, affirmed.

(Submitted October 27, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 30, 1896, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John H. Rogan for appellant. Whatever the intention of Roberts may have been with respect to the premises to be covered by the mortgage to the Mutual Life Insurance Company, nothing passed to the mortgagee under said mortgage except what was described therein. (*Thayer v. Finton*, 108 N. Y. 394; *Coleman v. M. B. I. Co.*, 94 N. Y. 229; *Fitzpatrick v. Sweeney*, 56 Hun, 159; 121 N. Y. 707; *Zink v. McManus*, 49 Hun, 583; *Thomson v. Wilcox*, 7 Lans. 376.) The encroachment of three and one-half inches, or three and three-quarter inches, was sufficient to defeat the present action. (*McPherson v. Schade*, 149 N. Y. 16.) The vendee is entitled to receive title to the land with four walls to the house, and these should stand on the land conveyed, that the purchaser may acquire an unimpeachable title to all. (*Smithers v. Steiner*, 34 N. Y. Supp. 678; *Vought v. Williams*, 120 N. Y. 253; *Sinyth v. McCool*, 22 Hun, 595; *Arnseen v. Burroughs*, 27 N. Y. Supp. 958; *Stokes v. Johnson*, 57 N. Y. 673.)

Samson Lachman and *Theodore Baumeister* for respondents. The objection to the title, that the house encroaches in the rear on the neighboring lots, is untenable. (*Tefft v. Munson*, 57 N. Y. 97; *M. L. Ins. Co. v. Corey*, 135 N. Y. 326; *Havens v. Kline*, 51 How. Pr. 82; *Sherman v. Kane*, 86 N. Y. 57; *Reed v. Furr*, 35 N. Y. 113; *Baldwin v. Brown*, 16

N. Y. 359; *Meyer v. Boyd*, 51 Hun, 291; *Breene v. Stone*, 5 N. Y. Supp. 5; *Ford v. Schlosser*, 13 Misc. Rep. 205; *Wilhelm v. Federgreen*, 2 App. Div. 483.) The mere existence of an old mortgage, unsatisfied on the public records, does not in itself constitute a valid objection to a title, the presumption being that the mortgage has been paid, or the right of foreclosure cut off by lapse of time. (*Martin v. Stoddard*, 127 N. Y. 61; *Belmont v. O'Brien*, 12 N. Y. 394.)

BARTLETT, J. The plaintiffs, vendors of real estate, seek in this action to compel a specific performance of the contract by the defendant, the purchaser of No. 747 East Ninth street, New York.

Three objections were made to the title, viz., an old unsatisfied mortgage, encroachment of one-half inch on the street and encroachment of half an inch on adjoining lot on the west, in the rear. The trial court found, upon sufficient evidence, that the mortgage does not constitute an incumbrance upon the premises and is presumed to have been paid. Also that the structure upon the premises does not encroach upon the street. The appellant contends that as to the further finding, that there is no encroachment on adjoining property, it is wholly unsupported by evidence.

As the order of the Appellate Division, affirming judgment of trial court, does not show upon its face that the decision was unanimous we will examine this point.

The source of plaintiff's title is one John Roberts, Jr., who, in 1851, took title to a lot of land on the north side of East Ninth street, in the city of New York, twenty-five feet wide in front and rear by ninety-two feet three inches deep, the east line of the lot being ninety-three feet northwesterly from the northwesterly corner of Ninth street and Avenue D. These premises were known as lot No. 115 on a certain map.

In 1880 Roberts executed a mortgage to the Mutual Life Insurance Company, and, for some unexplained reason, he did not follow the description of the deed to him in 1851, but conveyed to that company a lot which is admitted to be wholly

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located on original lot No. 115, but is only twenty-four feet eight and one-half inches wide, front and rear, by ninety-two feet three inches deep, and its east line is ninety-three feet two inches westerly from Avenue D. The result was that Roberts retained outside of the description contained in the mortgage two small strips of land within original lot No. 115 as conveyed to him, viz., one on the east two inches wide, and one on the west one and one-half inches wide.

This mortgage was foreclosed in 1892, and the referee executed to Abraham Katz and Louis Maier, the original plaintiffs and vendors, a deed following the description in the mortgage. The contract of sale and the deed tendered defendant also contained the same description.

It was proved at the trial that in the early days of his ownership, Roberts erected a building on the premises. A tenant was sworn who stated that she had lived in the building continuously for thirty-one years, and that the easterly and westerly walls had not been altered or moved during that time; that all of the walls of the house stand just where they stood when she moved in.

The plaintiffs' surveyor swore that the rear of the east wall was ninety-three feet west of Avenue D, and the defendant's surveyor agreed in this measurement. The surveyors differed as to distance of the front end of the east wall west of Avenue D; the plaintiffs' made it ninety-three feet one and three-quarters inches, and the defendant's ninety-three feet three inches. It will thus be observed that there is no question of encroachment on the east.

The plaintiffs' surveyor swore that the house in front was twenty-four feet eight and three-quarters inches wide and in the rear twenty-five feet. The defendant's surveyor made the house in front twenty-four feet six inches wide, and in the rear twenty-five feet and a quarter of an inch. The only possible encroachment on the west under this state of facts is one-quarter of an inch in the rear if defendant's figures are taken as correct, and none whatever if plaintiffs' figures are accurate. The finding of the trial court, that there was no

encroachment on the adjoining premises, is thus supported by evidence and will not be disturbed.

It further appears that Roberts acquired title to the premises on the west (lot No. 116) October 31, 1867, and held it for some years. Any existing encroachment by the building on lot No. 115 ceased at that time, Roberts being the common owner of the land.

A grantee of lot No. 116 under Roberts took the premises charged with the servitude of any encroaching wall. (*Lampman v. Milks*, 21 N. Y. 505; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Paine v. Chandler*, 134 N. Y. 385.) While we hold that the finding of no encroachment is sustained by the evidence, the point of common ownership shows that the charge of encroachment is without foundation.

The only question remaining is whether the fee to the small strips of land already referred to, which were covered by the description of Roberts' original deed, but omitted in his mortgage to the Mutual Life Insurance Company, is now in the heirs of Roberts, or do the covenants of the mortgage and the practical location of the east and west lines of the premises by the erection of the building between thirty and forty years ago make a complete title in the plaintiffs?

It is conceded that the only persons who can make a claim of title adverse to the vendors are the heirs at law of Roberts. The uncontradicted evidence clearly shows that between thirty and forty years ago Roberts made a practical location of the boundary lines of lot No. 115, when he erected a building that in the rear was twenty-five feet wide, covering the entire width of the lot he purchased in 1851.

It is the settled rule in this state, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long series of years will not be disturbed. (*Baldwin v. Brown*, 16 N. Y. 359; *Ratcliffe v. Gray*, 3 Keyes, 510; *Reed v. Farr*, 35 N. Y. 113; *Sherman v. Kane*, 86 N. Y. 57, 73.)

SELDEN, J., in *Baldwin v. Brown*, reasoned that this rule was not based upon the idea of an agreement, either express

or implied, but rather on the theory that acquiescence is proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary, and, if necessary, the law will presume a conveyance. The learned judge says: "The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles, and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years." It thus follows that Roberts and his heirs are bound by this practical location, and the plaintiffs can give defendant a good title to all of original lot No. 115 conveyed to Roberts in 1851.

It is also clear that when Roberts executed the mortgage to the Mutual Life Insurance Company he intended to convey to the company the building as it then stood upon the premises, and such intention a court of equity will carry out. (*Brookman v. Kurzman*, 94 N. Y. 272, 276.) The covenants in the mortgage bound Roberts and his heirs, and may be invoked to protect the title of the plaintiffs.

We think the title tendered to defendant is a marketable one, and that the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN H. HELLER, JR., et al., as Executors of and Trustees under the Will of JOHN H. HELLER, Deceased, Respondents, v. WILLIAM COHEN, Appellant.

1. APPELLATE DIVISION—REVERSAL—NEW TRIAL. The Appellate Division, upon reversing a judgment, must grant a new trial unless it is manifest that no possible proof applicable to the issue could entitle the respondent to recover.

2. SPECIFIC PERFORMANCE. Rules governing the enforcement of specific performance of contracts for the sale of land collated.

3. PARTITION—REFEREE'S DEED. If a referee's deed in partition covers premises other than those described in the complaint and directed

154	299
155	590
s 155	625

154	299
157	212

154	299
159	15

154	299
160	162
160	311

154	299
162	220
162	262
162	459

154	299
a164	377

154	299
a165	399

154	299
167	420

by the decree to be sold, it is without authority and passes no title to the purchaser.

4. **VENDOR AND PURCHASER — MARKETABLE TITLE — MATERIAL DEFECTS.** The title of the vendor of land is not a marketable one, and he cannot compel the purchaser to accept it, where it is based, as to a portion of the premises, upon a description in a referee's deed in partition which covers premises other than those described in the decree of sale, and as to another portion he shows no record title, and it is found as an inference, not opposed to the weight of evidence, from special facts and circumstances, that such defects are material.

5. **MATERIALITY OF DEFECT IN TITLE — QUESTION OF FACT.** The question as to the materiality of a defect in the offered title, in an action for specific performance, is one of fact when it depends upon, and is an inference to be drawn from, circumstances; and the Appellate Division is not authorized to reverse a decision of the trial court upon such question of fact, where there is no such preponderance of proof against the result reached by it as discloses, with reasonable certainty, that its conclusion was erroneous, or against the weight of evidence.

6. **ESTOPPEL.** There is no principle by which the unknown act of a referee in partition, in describing in his deed other premises than those described in the complaint and decree, estops the parties to the partition action from disputing the correctness of the deed; and a marketable title in the grantee of such a deed cannot be based upon any such estoppel.

7. **CORRECTION OF DEFECTS IN TITLE.** The purchaser of real estate from one whose title is based upon a judicial sale is entitled to a marketable title, free from reasonable doubt, and is in nowise bound to remedy it by proceedings to correct defects in the judicial sale.

8. **ADVERSE POSSESSION.** The mere fact that the vendor and his predecessor in title had been in the undisturbed possession of the premises described in a contract of sale for more than twenty years, without proof that the entry was under a particular conveyance, exclusive of any other right, does not of itself warrant a determination that their title has become perfect through adverse possession under a written conveyance, as against the true owner.

9. **TITLE SUBJECT TO LITIGATION.** The purchaser of real estate ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation where the title may depend upon a question of fact, as, where he would be required to resort to parol evidence to sustain the vendor's title by adverse possession.

10. **VARIANCE IN DESCRIPTION OF LAND.** A variance in the description of land in instruments essential to the title, such as between stating the place of beginning in one as the "northwest" corner of certain streets and in the other as the "southwest" corner, cannot be disregarded or changed, in support of an offered title, in an action to compel the purchaser to perform his contract, where there is no sufficient description in the instrument sought to be changed to plainly indicate the property

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Points of counsel.

intended and also to show that there is an error in the description which may be disregarded and the property still clearly identified.

Heller v. Cohen, 9 App. Div. 465, reversed.

(Argued October 27, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 17, 1896, which reversed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term, and directed a judgment absolute in favor of the plaintiffs.

The nature of the action and the facts, so far as material, are stated in the opinion.

George F. Danforth and *Samuel B. Hamburger* for appellant. The obligation of the defendant to purchase was upon condition that the vendor had a good and marketable title of record, and if the evidence fell short of establishing such a title the purchaser was not bound to accept it. (Fry on Spec. Perf. § 573; *Flureau v. Thornhill*, 2 W. Black. 1078; *B. P. Comrs. v. Armstrong*, 45 N. Y. 234; *Greenblatt v. Hermann*, 144 N. Y. 13.) A court of equity will not, by its interference, compel a purchaser to accept a title unless it is free from all doubts, either as to a matter of fact or law, or if it is so clouded by apparent defects that prudent men, knowing the facts, would hesitate to take it. (*B. P. Comrs. v. Armstrong*, 45 N. Y. 234; *McPherson v. Schade*, 149 N. Y. 16.) The plaintiffs, at the time they tendered a deed to the defendant, had no title to the north 100 feet of the premises described therein. (2 R. S. ch. 5, part 3, tit. 3, p. 316; *Clapp v. Bromagham*, 9 Cow. 306; *Postley v. Kain*, 4 Sandf. Ch. 508; *Doubleday v. Heath*, 16 N. Y. 80; *Alnatt on Partition*, 56; *Moore v. Onslow*, Cro. Eliz. 759; *Taylor v. Layer*, Cro. Eliz. 743, 760; *Striker v. Kelly*, 2 Den. 323; *Stone v. R. W. Co.*, 4 M. & C. 121.) The authority to make partition or sale depends upon the performance of certain preliminary acts prescribed in the statute and which must, in all cases, be shown to have been performed when title is sought to be established under such a sale or partition.

(2 R. S. 318, §§ 5, 10, 60; *In re N. Y. C. & H. R. R. Co.*, 70 N. Y. 191; *Denning v. Corwin*, 11 Wend. 654; *Corwith v. Griffing*, 21 Barb. 9; *Musten v. Olcott*, 101 N. Y. 158; *Jenkins v. Fahey*, 73 N. Y. 360; *Gallatin v. Cunningham*, 8 Cow. 361.) The effect of the record in partition was properly regarded by the court at Special Term as conclusive upon the rights of the parties. (*Cole v. Hall*, 2 Hill, 625; *Castle v. Matthews*, Lalor [Supp. to Hill & Denio], 438; *Musten v. Olcott*, 101 N. Y. 152.) The defendant had a right to an indisputable title — not merely a title valid in fact, but a marketable title, which could again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for a loan of money. (*Moore v. Williams*, 115 N. Y. 592; *Ferry v. Sampson*, 112 N. Y. 418; *Bernstein v. Nealis*, 144 N. Y. 347; 2 R. S. 200, § 154.) The plaintiffs are estopped by the record in the partition proceedings. (Greenl. on Ev. §§ 527, 538, 539; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Murray v. Deyo*, 10 Hun, 3; 95 N. Y. 219; 52 N. Y. 399; 50 N. Y. 381.)

A. Stern and Bailey & Sullivan for respondents. Courts will construe a deed and description therein according to the intention of the parties, and for that purpose will disregard erroneous facts, when there is sufficient left in the description to correctly locate and identify the premises. (*Bookman v. Kurzman*, 94 N. Y. 272; *Robinson v. Kime*, 79 N. Y. 147.) Assuming for the purpose of argument that this deed was ineffectual, the plaintiffs have, notwithstanding, a good title. (*Ottinger v. Strasburger*, 33 Hun, 466; 102 N. Y. 692.) The reference in all the deeds to the will of Thomas White, and following the erroneous description, sufficiently identifies the property and cures the defect. (*Thayer v. Finton*, 108 N. Y. 399; *Grandin v. Hernandez*, 29 Hun, 399.) The referee's deed was sufficient to convey the title. (*Croghan v. Livingston*, 17 N. Y. 225; *Meyer v. Boyd*, 51 Hun, 291; *Sweettenham v. Leary*, 18 Hun, 284; *Reed v. Farr*, 35 N. Y. 113; *Baldwin v. Brown*, 16 N. Y. 359.) If the deed to Thomas White and

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all subsequent deeds are void for uncertainty, plaintiffs have a good title by adverse possession. No adjoining owner or any other person can have any possible claim to any portion of these premises. (*N. Y. S. Co. v. Stern*, 46 Hun, 206; *O'Connor v. Higgins*, 113 N. Y. 511; *Ottinger v. Strasburger*, 33 Hun, 466; 102 N. Y. 692; *Murray v. Harway*, 56 N. Y. 344; *Shriver v. Shriver*, 86 N. Y. 575; *Hoepfner v. Sevestre*, 30 N. Y. S. R. 296.) This title does not rest upon any disputed question of fact or doubtful question of law. (*Holly v. Hirsch*, 135 N. Y. 590.) The Appellate Division had the power to render final judgment in favor of plaintiffs. (Code Civ. Pro. § 1317; *Price v. Price*, 33 Hun, 432; *Dammert v. Osborn*, 140 N. Y. 47; *Wood v. Baker*, 60 Hun, 337.)

MARTIN, J. On the fourth day of December, 1893, the parties to this action entered into a contract for the purchase and sale of certain real estate in the city of New York. The plaintiffs, in consideration of the sum of one hundred thousand dollars, five thousand dollars of which was paid at the execution and delivery of the agreement, and the remainder to be paid on the delivery of the deed on or before the first day of February, 1894, agreed to sell to the defendant certain premises which were described therein as follows: "Beginning on the southerly side of Grand street at a point distant seventy-five feet eleven and one-half inches westerly from the corner formed by the intersection of the southerly side of Grand street with the westerly side of Chrystie street; running thence southerly one hundred and twenty-five feet one inch; thence westerly parallel, or nearly so, with Grand street twenty-five feet one inch; thence northerly one hundred and twenty-five feet and three inches to the said southerly side of Grand street; and thence easterly along said southerly side of Grand street twenty-five feet to the point or place of beginning, be all said several distances and dimensions more or less. The premises hereby intended to be conveyed being now known and designated as and by the street number two hundred and forty-five Grand street, as now built upon and

inclosed, together with all fixtures in said premises belonging to the parties of the first part."

At the time named the plaintiffs tendered to the defendant a deed of the premises described in the agreement, which he refused to accept. He declined to accept the title offered upon the grounds: 1. That the description of the premises in the conveyances, through which the plaintiffs claimed title, was indefinite and insufficient to convey the premises described in the agreement. 2. That in 1867 they were sold under a decree in partition and purchased by the plaintiffs' testator, but that the referee appointed to make such sale, without authority, changed the description in the deed he gave, so that it did not conform to that contained in the complaint, and, hence, the deed was invalid; and, 3, that a survey of the premises disclosed that they commenced eleven and one-half inches west of the point mentioned in the deeds to the plaintiffs' testator and his grantors, immediate and remote, and, therefore, the deed tendered did not convey the whole of the premises agreed to be purchased, and also included land to which the plaintiffs had no title.

Subsequently, this action was commenced to compel a specific performance of the agreement by the defendant. It was defended upon the ground that the plaintiffs could not give a good or marketable title to the premises.

On the trial at Special Term, it was held that the title offered was not a marketable one, for the reasons: *First*, that from 1810 to 1867 the premises had been described in the various conveyances through which the plaintiffs claimed title, as commencing at a distance of seventy-five feet from the northwest corner of Chrystie and Grand streets, while the description in the contract commenced at a point seventy-five feet eleven and one-half inches from the southwest corner of Chrystie and Grand streets; *second*, that such conveyances did not locate the premises with sufficient certainty to properly identify them; and, *third*, that, although the deed to the plaintiffs' testator correctly described the premises, it was unauthorized and invalid, and, hence, the plaintiffs acquired

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no title to the property described in the agreement between the parties. The court also held that if the defendant was compelled to take a deed of the land described in the contract, it would include nearly one foot of land on the western boundary to which the plaintiffs had shown no record title. The Special Term dismissed the plaintiffs' complaint on the merits, and granted a judgment in favor of the defendant for the sum of five thousand dollars which he paid upon the execution of the contract, with interest from the fourth day of December, 1893, and also for the sum of two hundred and fifty dollars counsel fee for examining the title to the premises, together with costs.

From this judgment the plaintiffs appealed to the Appellate Division. That court reversed it, and directed a judgment in favor of the plaintiffs for the relief demanded in the complaint, with costs of the trial and upon the appeal. The validity of that judgment is to be determined here.

The decision of the Appellate Division, so far as it directed the entry of a judgment in favor of the plaintiffs, was clearly unauthorized. Upon reversing a judgment, that court must grant a new trial unless it is manifest that no possible proof applicable to the issue could entitle the respondent to recover. It must affirmatively appear that he cannot succeed upon a new trial. That it is improbable is not sufficient. (*Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571; *Goodwin v. Conklin*, 85 N. Y. 21, 26; *Capron v. Thompson*, 86 N. Y. 418, 421; *Guernsey v. Miller*, 80 N. Y. 181.) Obviously the Appellate Division had no authority to direct a judgment absolute against the defendant. Consequently it follows that, in any event, a new trial should be granted.

But, beyond that, the question is presented whether the defendant was not entitled to the relief granted by the Special Term. If so, then the judgment entered upon the decision of the Appellate Division must not only be reversed, but the judgment of the Special Term should be affirmed as well. This court has so recently and in so many cases examined the question as to the circumstances under which specific perform-

ance of a contract for the sale of land will be decreed, and stated the principles of law which should control in such actions, that any extended discussion of those questions is quite unnecessary at this time. We need only to state briefly the rules established by this court, which we deem applicable to this case.

(1) A purchaser at a judicial sale will not be compelled to take a doubtful title, and where irregularities or defects exist in the proceedings upon which the title rests, that require further or other action to cure them, and so prevent a performance of the contract of sale by the vendors at the time fixed, the objection of the purchaser, based upon the existence of those defects, should not be overruled, but he should be relieved from his contract. (*Toole v. Toole*, 112 N. Y. 333.)

(2) Where a vendee seeks to rescind a contract for the sale of real estate on account of defect of title, the question as to the materiality of the defect is one of fact when it depends upon and is an inference to be drawn from circumstances. (*Stokes v. Johnson*, 57 N. Y. 673.)

(3) To entitle a vendor to specific performance, he must be able to tender a marketable title. A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused. (*Vought v. Williams*, 120 N. Y. 253, 257; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Fleming v. Burnham*, 100 N. Y. 1.)

4) So, where there is a defect in the record title which can be supplied only by resort to parol evidence, and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract. (*Irving v. Campbell*, 121 N. Y. 353; *Holly v. Hirsch*, 135 N. Y. 590, 598.)

(5) The right of specific performance by a decree of a

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court of equity rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of such discretion. (*Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 297; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Gotthelf v. Stranahan*, 138 N. Y. 345, 351; *McPherson v. Schade*, 149 N. Y. 16, 21.)

The only title the plaintiffs' testator had to one hundred feet of the premises in question was under a deed made by a referee in a partition action between the then owners of the premises. The premises sought to be partitioned in that action, so far as they included the land in question, were described in the complaint as follows: "All that certain lot, piece or parcel of ground, with the buildings thereon erected, situate, lying and being in the Tenth Ward of the City of New York, beginning at the distance of seventy-five feet from the north-west corner of Chrystie (formerly First) Street on Grand Street, and runs south one hundred feet, more or less, to Isaac Berrian's ground by a straight line; then west twenty-five feet, more or less, to Thomas White's ground; then north one hundred feet to Grand Street, more or less, and then down Grand Street to the place of beginning, twenty-five feet, more or less." The foregoing was the only description of them contained in the complaint therein. Subsequently, that case was referred to a referee to take proof of the facts alleged. As to the property in question he reported that the decedent, under whom the parties claimed, obtained title thereto through a deed from one William Schotts to him, dated May 1, 1821, which was produced, and that the decedent had been in possession of the premises described in the complaint more than twenty-five years prior to his death, and was in possession at that time.

The testimony taken on the trial before the referee in that action is contained in the record, and shows that the proof related only to the premises as described in the complaint. Upon his report the Special Term entered a decree directing the property first described in the complaint, which

was the property in question, to be sold, and the same referee was appointed to make such sale. In that decree the property which he was directed to sell was described in the same manner as it was in the complaint. It was sold by him and purchased by John H. Heller, the plaintiffs' testator. The referee, however, when he gave a deed of the premises, instead of describing the property as it was described in the complaint and decree authorizing the sale, changed the description therein by altering the point of commencement so that it began at the southwest corner of Grand and Chrystie streets instead of the northwest corner of those streets. That alteration in the description was made without any order of the court or any other authority whatsoever. After making the sale, the referee made his report to the court, which was to the effect that he had sold these premises as described in the complaint for the sum of \$37,400. That report was subsequently confirmed by the Supreme Court, and the referee was directed to convey to the purchaser the premises as described in the complaint and decree.

Thus it is seen that in the report of the referee, in the order directing the sale, in the referee's report of sale, in the order confirming it, in the order directing a conveyance, and in the proof before the referee, the same description was given of the premises as was given in the complaint in that action.

If the description in the complaint is controlling, then it is clear that the plaintiffs' testator by the referee's deed obtained title to only a portion of the one hundred feet which were included in the premises which the plaintiffs agreed to sell and convey to the defendant. The fact that that deed described the premises sold by the plaintiffs to the defendant can hardly be regarded as changing the situation. Obviously, the referee had no title to the premises, and hence could transfer none except such as he was ordered by the court to convey. His duties were ministerial in their nature, and, consequently, he possessed no authority to vary the judgment or decree directing the sale or to convey or transfer any property except in pursuance of its directions. (*People ex rel. Day v. Bergen*,

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53 N. Y. 404.) The sale was valid only as far as it was in compliance with the decree in that action. So far as the deed covered premises other than those described in the complaint and directed by the decree to be sold, it was without authority and passed no title to the purchaser.

Moreover, the premises described in the contract, which the plaintiffs by this action seek to compel the defendant to perform, included eleven and one-half inches of ground on the westerly side, to which the plaintiffs showed no record title. Upon these facts the learned trial judge found that the plaintiffs' title was not a marketable one. We are of the opinion that this finding was authorized by the proof and that the Appellate Division was not justified in reversing the judgment of the Special Term.

Obviously there were imperfections or defects in the plaintiffs' chain of title. Under the rules established by the decisions of this court, the question as to the materiality of a defect is one of fact when it depends upon and is an inference to be drawn from circumstances. Here there were special facts and circumstances to be taken into account and considered by the trial court in determining the materiality of the defects in the plaintiffs' record title, and the effect of the plaintiffs' inability to convey that portion of the land to which they had no title and which was included in the contract between the parties. As the materiality of these defects in the plaintiffs' title was a question of fact, the learned Appellate Division was not, we think, authorized to reverse the decision of the Special Term, as there was no such preponderance of proof against the result reached by it as disclosed, with reasonable certainty, that its conclusion was erroneous, or against the weight of evidence. "To sustain a reversal on the facts by an intermediate court, it must appear that the decision of the trial court is against the weight of evidence, or that the proof so clearly preponderates in favor of a contrary result that it can be said, with a reasonable degree of certainty, that the trial court erred in its conclusions." (*Foster v. Bookwalter*, 152 N. Y. 166, 168.)

But it is said that even if the deed given by the referee to the plaintiffs' testator was invalid, still, the heirs of his grantor would be bound by the description in the referee's deed, upon the ground that they sold the property, received the proceeds, and are, therefore, estopped from disputing the testator's title to the premises as described therein. It is difficult to perceive the grounds upon which such an estoppel could be based. The parties to the partition action were doubtless served with a copy of the summons and complaint, or summons and notice of object of action, which disclosed that the action was for the partition of the premises described therein. As the decree of the court authorized the referee to sell the premises thus described, and none other, how the unknown act of the referee in describing other premises in his deed would estop the parties from disputing its correctness, is not quite apparent. We hardly think it can be held that the plaintiffs have a marketable title based upon any such estoppel.

The learned justice of the Appellate Division who delivered the opinion of that court in this case, stated that the purchaser at the referee's sale was entitled to a conveyance of the property described in the complaint in that action, since he bought and paid for it. This must be admitted. But the difficulty with the title obtained by the plaintiffs' testator lies in the fact that the referee disregarded the description contained in the complaint and the decree directing the sale, and made a new description of his own, which included one hundred feet of the property which the plaintiffs agreed to convey to the defendant, while he was authorized by the decree to sell the property described in the complaint, which constituted only about one-half of it.

It may be that the purchaser under the partition sale, or his representatives, may apply to and obtain from the Supreme Court a correction of the record in the partition action, and thereby perfect the title to the premises in the plaintiffs. But the defendant should not be required to bear the burden and expense of such a proceeding. He was entitled to a market-

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able title, free from reasonable doubt, and was in nowise bound to remedy its defects. (*Toole v. Toole, supra.*)

Again, it is said that the plaintiffs' title had become perfect through the adverse possession of their testator. The learned Appellate Division, although it assumed to do so, was not in a position to determine that question. The proof was not sufficient to require such a determination by the Special Term, and it declined so to hold. The reversal of that determination and a finding by the Appellate Division that the plaintiffs had a title by adverse possession, were unauthorized. There are cases where title by adverse possession may, and will, be upheld. If there is no disputed question of fact, and the possession has been clearly adverse and undisturbed for the required period, the title may be sustained. But even in such a case that class of titles is not looked upon with much favor by persons who contemplate purchasing the property or loaning their money thereon, or by the courts. (*Hartley v. James*, 50 N. Y. 38.)

To establish title by adverse possession, it must be shown that the person holding the possession did so in open hostility to the rights of the true owner. The presumption is that the possession is in subordination to the actual title. (*Doherty v. Matsell*, 119 N. Y. 646.) It is not sufficient that he has merely held the possession undisturbed for the period of twenty years. The fact that the plaintiffs and their predecessor in title were in the undisturbed possession of the land for twenty years and upwards, does not show that the possession was adverse. It does not necessarily follow therefrom that their entry was under the deed mentioned, exclusive of any other right, and this was essential to constitute an adverse holding under a written conveyance, which would divest the title of the true owner after twenty years. It may be that there was an adverse possession for the requisite period. But the court cannot draw that inference from the evidence in this case, as the most that can be said to have been established by it is that the plaintiffs' testator was in the undisturbed possession of the premises for a period of more than twenty years. (*Kneller v. Lang*, 137

N. Y. 589.) The theory upon which the legal title to land may be acquired by one holding it adversely for that period, is that it is to be implied because of the acquiescence of the true owner in the hostile claim of title for that time. (*Baker v. Oakwood*, 123 N. Y. 16.) We think no such implication arises from the proof in this case.

Moreover, to sustain the plaintiffs' title by adverse possession, the defendant or his grantees would be required to resort to parol evidence, and it may be that it will depend upon an issue of fact as to which some dispute may arise. Under such circumstances, the purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation where the title may depend upon a question of fact. (*Irving v. Campbell*, *Holly v. Hirsch*, *supra*.)

The respondents likewise urge that the case of *Brookman v. Kurzman* (94 N. Y. 272), and other similar cases cited, are controlling upon the question of the sufficiency of the description contained in the deed and judgment under which they claim title, and insist that they justified the Appellate Division in changing the description as to the place of beginning from the northwest to the southwest corner of Grand and Chrystie streets, and in holding that the premises included in such amended description were the premises to which the plaintiffs had title. We do not think those cases sustain that decision. It will be found that in each of the cases cited there was a sufficient description in the conveyance there under consideration not only to plainly indicate the property intended, but also to show that there was an error in the description which might be disregarded, and the property still clearly identified. It was upon the ground that the property could be clearly identified by the description as it existed in those cases, and that it plainly showed that there was an error in the description, that those decisions were based. But they have no application here, as the case at bar is unlike the cases cited. Here, unless the point of beginning is established, there is no sufficient description to identify the premises with that certainty

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which should exist before the defendant ought to be required to accept the title offered. Nor was there any proof that the premises could be identified by the adjoining lands which was sufficient to satisfy the rules relating to this subject.

Unless the title offered was marketable and free from reasonable doubt, the defendant ought not to be required to accept it. While we do not regard the plaintiffs' title as actually bad, and while it is quite probable that a good title may be established, yet we think the proof was insufficient to show that it was so far free from any reasonable doubt as to require its acceptance by the defendant, and hence that the trial court properly dismissed the complaint and awarded the defendant the relief to which he was entitled.

The judgment of the Appellate Division should be reversed, and the judgment entered upon the decision of the Special Term affirmed, with costs to the appellant in the Appellate Division and in this court.

All concur.

Judgment reversed. _____

In the Matter of the Accounting of STEPHEN BROWN and DWIGHT MERRIMAN, as Trustees under the Will of ABRAHAM WING, Deceased.

ELLA W. SHARP, Appellant; WILLIAM H. WITHINGTON, as Administrator of HOWARD L. MERRIMAN, Deceased, et al., Respondents.

1. **WILL — VESTED REMAINDERS.** Where the apparent intention of the testator is that remainders shall vest in persons as to whom there is no uncertainty, subject to the life estate or estates created by the will (as, that they shall vest in his grandchildren, and there are grandchildren in being at his death, and there is nothing in the will making such provision dependent upon survivorship to the time of distribution), the disposition relates back to the time of the testator's death, and the vesting is of that date.

2. **POWER OF SALE.** The presence in a will, of an imperative power of sale given to the executors to be exercised at a future time, does not necessarily prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest presently.

154	818
156	404
154	818
d160	290
d160	325
154	818
168	195
168	200
154	818
166	408
166	516
154	818
167	484
167	498

3. **CONVERSION OF REAL PROPERTY INTO PERSONAL.** The fact that by the exercise of the power of sale given to the trustees of an estate for lives, and to which the remainder is subject, real property would become personal property, makes no difference in the effect of the power of sale upon the question of the vesting of the remainder as of the date of the testator's death.

4. **ESTATE OF TESTAMENTARY TRUSTEES.** Where an estate is devised in trust, to provide an income for life beneficiaries and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all.

5. **DIRECTION TO DIVIDE.** The general rule, that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent and not vested, is subordinate to the primary canon of construction, that the intent, to be collected from the whole will, must prevail.

6. **DETERMINATION OF CLASS.** When a devise or bequest is made to a class, as, to children of children, the class will, in the absence of a definite intention disclosed by the will, be ascertained and determined as of the death of the testator; and if the estate then vests, it vests in the individual beneficiaries as tenants in common.

7. **INCOME ATTACHED TO VESTED REMAINDERS, PENDING DISTRIBUTION OF CORPUS.** If a will gives a portion of the income of the estate to the widow for life and the income of a specific share of the residue to each child for life, with remainders over to children's children, in such terms that the remainders vest, at the testator's death, in the grandchildren in being at that time, as tenants in common, subject to the outstanding life estates, with a postponement of distribution dependent upon the death of the widow, the estate vested in the grandchildren draws to it their parent's share in the income, in case of the death of the testator's children, the widow still living; and if a grandchild, whose remainder was vested, dies, his share in such income passes to his personal representative.

Matter of Merriman, 91 Hun, 120, affirmed.

(Argued October 27, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the third judicial department, entered January 3, 1896, which affirmed a decree of the Surrogate's Court of Warren county, stating and settling the accounts of Stephen Brown and Dwight Merriman, as trustees under the will of Abraham Wing, deceased.

The facts, so far as material, are stated in the opinion.

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Points of counsel.

Richard L. Hand for appellant. The entire estate is vested in the executors, as trustees, and the title will remain in them until the death or remarriage of Frances A. Wing. (Schouler on Wills, § 466; 1 Jarman on Wills [5th ed.], 839; *Cochrane v. Schell*, 140 N. Y. 516; *Dana v. Murray*, 122 N. Y. 604; *Delaney v. McCormack*, 88 N. Y. 174; *Vincent v. Newhouse*, 83 N. Y. 505; *Downing v. Marshall*, 23 N. Y. 366; *In re Baer*, 147 N. Y. 348; *Delafield v. Shipman*, 103 N. Y. 463; *Shipman v. Rollins*, 98 N. Y. 311; *Smith v. Edwards*, 88 N. Y. 92; *Colton v. Fox*, 67 N. Y. 348.) There is no vesting of income, but a simple direction to pay it, as it comes into existence, to a class then in existence. The appellant, Ella W. Sharp, is the only person now answering the description, and, therefore, is solely entitled to said income. (*Scott v. Nevius*, 6 Duer, 672; *Tolles v. Wood*, 99 N. Y. 616; *Wetmore v. Wetmore*, 149 N. Y. 520; *In re Allen*, 151 N. Y. 243; *In re Kimberly*, 150 N. Y. 90; *In re Baer*, 147 N. Y. 348; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Delaney v. McCormack*, 88 N. Y. 174; *Ferrer v. Pyne*, 81 N. Y. 281; *Hoppock v. Tucker*, 59 N. Y. 202.) If the construction of this will were doubtful that construction should prevail which prefers the blood of the testator to strangers. (*Vanderzee v. Slingerland*, 103 N. Y. 47; *Wood v. Mitcham*, 92 N. Y. 375; *Kelso v. Lorillard*, 85 N. Y. 177; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Scott v. Guernsey*, 48 N. Y. 107.)

Edwin Countryman for respondents. The principal reliance of the appellant is that the entire estate is vested in the executors, as trustees, and the title will remain in them until the death or remarriage of the testator's widow; and the argument is that during the continuance of the trust, so called, the title or interest of the remaindermen could not vest in any portion of the estate. This view is at variance with the statute and all the authorities. (1 R. S. 729, §§ 60, 61; *Crooke v. County of Kings*, 97 N. Y. 421; *In re Tienken*, 131 N. Y. 391; *Stevenson v. Lesley*, 70 N. Y. 512; *Heermans v. Robertson*, 64 N. Y. 332; *Heermans v. Burt*, 78 N. Y.

259; *In re Mahan*, 98 N. Y. 372; *Goebel v. Wolf*, 113 N. Y. 405; *Van Arxte v. Fisher*, 117 N. Y. 401; *Knowlton v. Atkins*, 134 N. Y. 313; *In re Young*, 145 N. Y. 535; *Losey v. Stunley*, 147 N. Y. 560.) The interests given to the children of the two daughters of the testator vested at his death. (1 R. S. 723, § 13; *Moore v. Littell*, 41 N. Y. 66; *Lawrence v. Bayard*, 7 Paige, 70; *Mead v. Mitchell*, 17 N. Y. 210; *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218; *House v. Jackson*, 50 N. Y. 161; *Monarque v. Monarque*, 80 N. Y. 320; *Surdam v. Cornell*, 116 N. Y. 305; *Hotaling v. Marsh*, 132 N. Y. 29.)

Charles A. Blair for William H. Withington, respondent. The estates of Mary W. Merriman for life and of her children in fee, between whom the entire fee was parceled out, all vested at the instant of the death of the testator, the only difference being that the estate of the mother was in possession and that of the children was in remainder. (1 Jarman on Wills [2d ed.], 620; *Moore v. Lyons*, 25 Wend. 119; *Byrnes v. Stilwell*, 103 N. Y. 453; *In re Crossman*, 6 Dem. 148; *Manice v. Manice*, 43 N. Y. 368.) The language of the "intention clause" clearly imports a direct gift to the grandchildren, and that, therefore, the rule invoked by the appellant, that where there is no gift but by the direction to pay at a future time, the gift is contingent, does not apply. There is a clear gift distinct from the direction to pay or distribute at a future time, and in such cases the direction to pay in the future does not postpone the vesting. (29 Am. & Eng. Ency. of Law, 454, 458; *In re Young*, 145 N. Y. 535; 1 Jarman on Wills [6th ed.], 813; *Madison v. Wood*, 4 K. & J. 709; *Fuller v. Winthorp*, 3 Allen, 51; *Fairly v. Kline*, 2 Pennington, 554; *Provenchere's Appeal*, 67 Penn. St. 464; *Taylor v. Mosher*, 29 Md. 443; *Brent v. Washington*, 18 Gratt. 526; *Cropley v. Cooper*, 86 U. S. 174; *In re Tienken*, 131 N. Y. 391; *Crooke v. County of Kings*, 97 N. Y. 421.) The courts have always attached importance to the absence of limitations over, or the lack of words of survivorship, or other

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expressions in the will intimating selection among the objects of the testator's bounty in case of deaths before the period of distribution. (*Byrnes v. Stilwell*, 103 N. Y. 453; *Shangle v. Hullock*, 39 N. Y. Supp. 619.) A gift of the interest, income or produce of a fund, without limitation as to continuance or without limit as to time, will, according to a settled rule of construction, be held to pass the fund itself, and this will be the effect given to a gift made in this form, whether the gift be made directly to the legatee or through the intervention of a trustee. (2 Wms. on Exrs. 1193; *Craft v. Snook*, 13 N. J. Eq. 121; *Gulick v. Gulick*, 25 N. J. Eq. 324; *Huston v. Read*, 32 N. J. Eq. 591; *Patterson v. Ellis*, 11 Wend. 259; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Lane v. Goudge*, 9 Ves. Jr. 225; *Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Ather-ton*, 28 L. J. Ch. 486.)

A. D. Wait for Dwight Merriman, respondent. If, as insisted by the appellant, this will is to be construed as creating no interest in the children till the time shall come for the taking by them, then in the event, which is possible, that Mrs. Wing should survive all the grandchildren, or at least all of the children of Mrs. Merriman, there would be complete or partial intestacy and the intention so clearly disclosed of the testator, wholly or in part defeated; there is in this case no room for such a construction. (*Vernon v. Vernon*, 53 N. Y. 351; *Provoost v. Calyer*, 62 N. Y. 545; *Schult v. Moll*, 132 N. Y. 122; *In re Tienken*, 131 N. Y. 391; *Stevenson v. Lesley*, 70 N. Y. 512; *Moore v. Lyons*, 25 Wend. 126; *Manice v. Manice*, 43 N. Y. 303; *Traver v. Schall*, 20 N. Y. 89; *Everitt v. Everitt*, 29 N. Y. 39; *Sheridan v. House*, 4 Keyes, 569; *Bowditch v. Ayrault*, 138 N. Y. 222; *In re Young*, 145 N. Y. 535, 539.)

HAIGHT, J. The question presented for review arises out of the construction which should be given to the will of Abraham Wing, who died on the 13th day of June, 1873, leaving him surviving his widow, Frances A., and two daughters

Mary W., the wife of Dwight Merriman, and Ella W. Parker. At the time of his decease his daughter Mary W. had three children, Tracy D., Ella W. and Howard L. Merriman. His daughter Ella W. also had children, but they have no interest involved in this appeal. All of the testator's grandchildren were born before the execution of the will, and survived the testator. Tracy D. Merriman died intestate, unmarried, January 19th, 1880. Mary W. Merriman died June 10th, 1892. Howard L. Merriman died August 4th, 1893. The testator's daughter Ella W. Parker died October 3d, 1892; all of her children survived. The appellant, Ella W. Sharp, is the sole surviving child of Mary W. Merriman. The widow of the testator, Frances A., is still living and has never remarried.

The testator devised and bequeathed to his widow his mansion house and lot, so-called, during the time that she should remain his widow, and also gave her other personal property, together with an annuity of three thousand dollars. Other specific bequests were made, which are not involved in this controversy. He then gave and devised all the rest and residue of his real and personal estate, of whatever name or kind and wheresoever situate, to his executors, in trust for the purposes named in his will, which he fully described; and then, by the fourth and fifth clauses of his will, provided:

"*Fourth.* I hereby authorize and direct my executors to apply and appropriate the avails and proceeds of said property and income therefrom to the uses and purposes following: 1st. To pay my funeral expenses and all of my just debts. 2nd. To pay the above-mentioned annuity to my wife and also so much more money (if any) as shall be at any time and all times necessary and proper in the discretion of my executors for the support and maintenance of said Frances A. and to enable her to keep up and support the same style of living and expenditure of money in all respects, including charitable and other purposes, that she has heretofore enjoyed or now enjoys, and my executors are hereby authorized and directed to pay such sum or sums of money in addition to said annuity as may from time to time be proper in their dis-

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cretion for such purpose to said Frances A. Wing, and her receipts therefor shall be a sufficient discharge to them and voucher for money so paid. 3rd. To furnish whatever money may be necessary, in the discretion of my executors, for the reasonable care and support of my sister, Mary Ann Wing, from time to time as she shall need the same, and also to pay her funeral expenses. 4th. To pay over all the balance of the income and increase of my estate except the expenses of the execution of this trust, including taxes and all other legal charges thereon (which are to be first paid), annually until the death or marriage of said Frances A. to my said daughters Mary W. Merriman and Ella W. Parker, share and share alike, for their own use and benefit respectively, and in case of the decease of either of said daughters during the widowhood of said Frances A., as aforesaid, then, and in such case, to pay the (half) share of said income to the children of such deceased daughter which would have belonged and been paid to the deceased daughter had she survived; and in case of the death of both of said daughters during the widowhood of said Frances A., then such income shall be paid and belong to the children of said daughters, respectively, one-half of said income to the children of Mary W., and the other half to the children of Ella W., from and after the death of each of said daughters respectively.

"Fifth. I direct my executors on the death, or if she shall marry, then on the marriage of said Frances A., to convert said mansion house and lot and any other real estate remaining undisposed of (if any) into personal property, so that my whole estate shall become personal property; and if my sister Mary Ann shall then be living, to set apart the sum of (\$5,000) five thousand dollars therefrom and invest the same as a fund out of which, and the income therefrom, my executors shall provide for her support and maintenance during her lifetime as above directed, and funeral expenses; and whatever may not be used and appropriated for that purpose, I give and bequeath as follows: If my daughters shall be both

living, one-half to each of them; if one daughter only shall be then living, one-half to her and the other half to the children of the deceased daughter; and if both daughters shall be deceased, then one-half to the children of one daughter and the other half to the children of the other daughter, and the balance (after deducting said \$5,000) and the whole if said Mary Ann shall not survive the death or marriage of said Frances A., shall be divided into two equal parts, share and share alike, by my executors, and be disposed of as follows: 1st. If neither of my daughters shall be then living one of said half parts shall be paid to the children of said Mary W. and the other half to the children of said Ella W. 2nd. If one of said daughters shall be then living and the other deceased, then one of said parts shall be paid to the children of the deceased daughter, and the other half parts shall be invested and kept invested by my executors during the lifetime of such surviving daughter, and the income therefrom shall be annually paid over to her, and on her decease the principal shall be paid over to her children. 3rd. If both my said daughters shall be then living, then one of said half parts shall be set apart for and assigned to the children of Mary W., and kept invested by my executors during her lifetime and the income thereof paid over annually to said Mary W., and on her decease the principal of such half part shall be paid over to her children, and the other half part shall be set apart for and assigned to the children of said Ella W. and kept invested by my executors during her lifetime and the income thereof paid over annually to said Ella W., and on her decease the principal of such half part shall be paid to her children. It being my intention and will that my said daughters shall have and enjoy absolutely for their own property during their lives respectively, each one-half of the whole income of my estate from the date of my decease (subject, however, to the provisions and bequests in favor of my wife and sister, and all taxes, the expenses of executing the trusts herein created and all other legal charges and also excepting the real estate and use thereof devised to said Mary W. and

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her children), but no part of the principal (except said \$5,000, or the balance thereof which may remain after the decease of my sister Mary Ann), and that the principal (except said \$5,000 or the balance thereof unexpended, and said devises in fee) shall be equally divided between the children of said daughters absolutely for their own property, subject, however, to the above-provided life estates in the same; one-half to the children of Mary W., and the other half to the children of Ella W. And the receipts of said Mary W. and Ella W., respectively, for such income, shall be a sufficient discharge and voucher to my executors."

The appellant claims that, upon the death of her mother, she, by reason of the prior death of her brother Tracy, became entitled to one-half of the income enjoyed by her mother in her lifetime; and that, after the death of her brother Howard, she, as the only surviving child, became entitled to the whole income; and that, upon the death of her grandmother, the testator's widow, she will be entitled to the *corpus* of one-half of the whole of the trust estate, the children of Ella W. Parker being entitled to the other half. The surrogate held that, upon the death of the testator, his grandchildren by his daughter Mary took a vested interest in one-half of the estate, subject to the outstanding life estates provided for by the trust, and that his grandchildren by his daughter Ella W. took a like vested interest in the other half of the trust estate; and that one-third of the net income thereof, after the death of her mother, belongs to the appellant; one-third to Withington, as administrator, etc., of Howard L. Merriman, deceased, and one-third to Dwight Merriman, individually, as father and next of kin of Tracy W. Merriman, deceased.

It will at once be observed that the controlling question is, whether the estate vested in the grandchildren upon the death of the testator, subject to the outstanding life estates.

The statute provides that "future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession

of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain." (1 R. S. 723, section 13.) Upon the death of the testator the grandchildren were all in being; under the will they had the immediate right to the possession of the estate upon the termination of the life estates. Their estates were, therefore, vested at the time of the death of the testator, unless there are some provisions of the will making the persons to whom, or the events upon which the estates are limited to take effect, uncertain. Upon referring to the provisions of the will, we find that the trustees are to first pay out of the income of the trust estate the annuity to the widow; they are then required to provide for the reasonable care and support of the testator's sister; and all the balance of the income is to be paid to his two daughters, share and share alike, and in case of the decease of either of the daughters during the life of his widow "then and in such case to pay the half share of said income to the children of said daughter, which would have belonged and been paid to the deceased daughter had she survived." And then again, in speaking with reference to the *corpus* of the estate, after the terminations of the life estates provided for, he directs his trustees to pay one-half of the estate to the children of Mary W., and the other half to the children of Ella W. It will be observed that no words of survivorship are used, either in the provision with reference to the income, or with reference to the *corpus* of the estate. Had he stated that the income, or the *corpus* should be paid to the children then surviving, there would have been reason for the contention that the persons who were to take remained uncertain and could not be determined until the time arrived at which the estate could be distributed. He then concluded with a declaration of his intention, saying: "It being my intention and will that my said daughters shall have and enjoy absolutely for their own property during their lives respectively, each one-half of the whole income of my estate from the date of my decease, * * * and that the

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principal * * * be equally divided between the children of said daughters absolutely for their own property, subject, however, to the above-provided life estates in the same. One-half to the children of Mary W., and the other half to the children of Ella W." Here again we have an express provision declaring his intention to give the estate absolutely to the grandchildren, without words of limitation as to the survivors, but subject to the outstanding life estates. How could they take subject to the outstanding life estates if their estates were unvested and contingent? If contingent, the persons who would take would remain uncertain until the termination of the life estates, and they would not be vested with title until the happening of that event, and then they would take absolutely, subject to no life estate.

Some question with reference to the word "estate" was raised upon the argument. As printed in the appeal book, it is in the singular, instead of plural; but the meaning is apparent; it could not well refer to any estate other than that provided for in the will, and must, of necessity, relate to the estates created thereby, whether it be one or more.

It is thus apparent that it was in the contemplation of the testator that the remainder should vest in his grandchildren, subject to the life estate or estates created by him, and this, under the statute and rules of construction, would relate back to the time of his death, and the vesting would be of that date.

It is contended that a different intention is to be drawn from the provisions of the will, providing that, after the death or remarriage of his widow, his executors should convert the mansion house and lot and other real estate remaining undisposed of into personal property, so that the whole estate should become personal property, and that if his sister Mary Ann should then be living, to set apart the sum of five thousand dollars and invest the same for her support and maintenance during her life. The sister has not survived the widow; had she survived, some question might have arisen with reference to the five thousand dollars set apart for her

use during life; but in view of her decease, no question can now arise with reference to the validity of that provision. It is true that an imperative power of sale, to be exercised at some future time, has been given as a reason for holding that it was not the intention that an estate should vest at the time of the testator's death. (*Dana v. Murray*, 122 N. Y. 604.) But in that case there were other provisions of the will which controlled the decision. An imperative power of sale is one of the facts which must be taken into consideration in determining the intention of the testator, and, when considered in connection with other provisions of the will, it may be an indication that it was intended that the estate should not vest until the imperative power of sale was exercised. But such a clause in a will does not necessarily prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest. An estate may vest subject to the execution of the power, which may be for the purpose of distribution only, the effect of which would be to transfer the title in the realty to the proceeds. The mansion house property formed no part of the trust estate during the life of the widow; its use was given to her by an independent clause. She has survived both of the daughters, so the same can never come under the control of the executors for the purposes of the trust, and the only power they have over the same is the naked power of sale for distribution. Other real estate was, however, included in the trust; but, under the circumstances of the case, we fail to see any reason why the remainder did not vest in the grandchildren as of the date of the testator's death. It is true that it was subject to the power of sale, given to the executors, by the exercise of which it would become personal property; but this could make no difference, for the rules governing estates or interests in lands, whether founded upon statutes or general principles of law, are, so far as practicable, applied to estates or interests of a like character in personal property. (1 R. S. 773, section 2 See, also, *Mills v. Husson*, 140 N. Y. 99-104.)

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If we are correct with reference to this construction of the will, the contention that the whole estate vested in the executors as trustees cannot be sustained. The trust estate doubtless did vest in the trustees, but the remainder was never given to them. The estate vested in them subject to the execution of the trust, which was limited in duration, and after its termination they were directed to divide among the grandchildren. This does not mean that they were the owners of the absolute fee, but simply so much of the estate as was put in trust and as was necessary to provide the income. The remainder of the estate, after the termination of the trust, was either vested or contingent, as we have shown, and the estate of the trustees was subject thereto. (*Crooke v. County of Kings*, 97 N. Y. 421, 446-447; *Matter of Tienken*, 131 N. Y. 391, 401.)

A rule formulated in a number of cases is to the effect that where the only gift is found in a direction to divide at a future time, the gift is *future* and not immediate, contingent and not vested. (*Leeke v. Robinson*, 2 Mer. 363; *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 N. Y. 92.)

The appellant invokes this rule and urges that the will contains only a direction to divide and pay over the income and the *corpus* of the estate to the grandchildren, after the happening of the events specified in the will. This question was fully considered by this court in the case of *Goebel v. Wolf* (113 N. Y. 405) in which it was held that the general rule, when a testamentary gift is found only in a direction to divide at a future time, the gift is *future* and contingent and not vested, is subordinate to the primary canon of construction, that the intent, to be collected from the whole will, must prevail, and taking the whole will together, it was the intention that the children should each take a vested remainder, upon the death of the testator, in one-fourth of the residuary estate, dependent upon the termination of the trust; that the share of the one who died, with the accumulations of income therefrom, descends to his heirs or next of kin, according to the nature of the property, and that such descendants were entitled to any

income which may thereafter accrue during the trust period. We have already referred to the provisions of the will in which the testator declared his intention that the principal should be equally divided between the children of his daughters absolutely for their own property, subject, however, to the life estates created by the will, and to the construction which should be given thereto. This, we think, clearly takes the case out of the rule invoked and brings it within the rule adopted in the case of *Goebel v. Wolf* (*supra*).

It is further contended that the gift was to the grandchildren as a class, and, therefore, only those who answer that description, when the estate is to be turned over, can take. In legal contemplation a gift to a class is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal, or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number. (1 Jarman on Wills [5th ed.], 269; *Matter of Kimberly*, 150 N. Y. 90-93; *Manier v. Phelps*, 15 Abb. [N. C.] 123.)

Assuming, for the purposes of this case, that, at the time of the execution of the will, the gift to the grandchildren was to a class, it does not necessarily follow that their estates did not vest as tenants in common upon the decease of the testator, for, in the absence of a different intention disclosed in the will, the class will be ascertained and determined as of the death of the testator. Schouler on Wills, at section 529, says: "Our law, instead of supposing that a gift to objects thus brought together should include naturally all of that class who may fulfill the description at any time, presumes rather that the testator intended the class to be ascertained upon his death, and neither earlier nor later. Hence, a devise or bequest to children of A., or of the testator, means *prima facie* to those of that class in existence at the time of the testator's death, provided there be any at all to answer that description; and this rule extends to grandchildren, issue, brothers, nephews and cousins. * * * In short, the disposition is to regard all testamentary gifts to members of a class

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consisting of children, grandchildren, issue, brothers, nephews or cousins, as intending *prima facie* that class as it may exist at the testator's death, whether the effect be to reduce or extend the number of individual beneficiaries entitled to the fund." And again, in section 530, he says: "Hence the English rule, confirmed by many American precedents, that the devise or bequest of a *corpus* or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in any who may come into existence afterwards, at any time before the fund is distributable. And this rule of construction, like the former one, extends its favor to grandchildren, issue, brothers, nephews and cousins."

In 2 Jarman on Wills (168, 6th ed.) it is said: "Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace, not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. * * * In cases falling within the rule the children, if any, living at the death of the testator take an immediately vesting interest in their shares, subject to the diminution of those shares as the number of objects is augmented by future births, during the life of the tenant for life, and, consequently, on the death of any of the children, during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective representatives."

In the case of *Campbell v. Stokes* (142 N. Y. 23) the testator left him surviving six children and sixteen grandchildren. By his will he divided his residuary estate into as many shares as he had surviving children, and gave to each the income of one share during life, with the principal of such share, on the death of any child, to his issue *then surviving*. He thus contemplated the possible death of a child before his own death, leaving issue surviving, and in that case, such issue surviving at decedent's death, was to take absolutely the share of the deceased child. It was held that, upon the death of the tes-

tator, individuals of the class entitled to take a remainder were in existence and ascertainable, and that the issue of any child of the testator living at his death would take under the will a vested remainder. (See, also, *The Attorney-General v. Crispin*, 1 Brown's Ch. Rep. 386; *Matter of Tienken*, 131 N. Y. 391; *Stevenson v. Lesley*, 70 N. Y. 512; *Moore v. Lyons*, 25 Wend. 143; *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Young*, 145 N. Y. 535; *Kent v. Church of St. Michael*, 136 N. Y. 10; *Embury v. Sheldon*, 68 N. Y. 227; *Surdam v. Cornell*, 116 N. Y. 305.)

Our conclusion, therefore, is, that the grandchildren of the testator took a vested interest in the trust estate at the time of the death of the testator, subject to the life estates created by the will, and that the income derived therefrom, after the death of the mother, follows the estate so vested and passes to the personal representatives of the deceased grandchildren.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

KATE RYAN, as Administratrix of WILLIAM RYAN, Deceased,
Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF NEW YORK, Respondent.

1. NEW YORK CITY — DISCHARGE OF AQUEDUCT EMPLOYEE. Undisputed evidence that, after receiving from the aqueduct commissioners a written demand for immediate resignation, an inspector of masonry upon the new aqueduct in New York city did not report for duty, or perform or offer to perform any services, but made demands for reinstatement, raises such an inference that he regarded the demand for resignation as a discharge, as to take the question from the jury, in an action for subsequent salary.

2. FORM OF DISCHARGE. Where there is no question as to the power of the authorities to dismiss a municipal officer, it is immaterial what is the language used to effect his discharge, provided it is so understood by him.

3. EVIDENCE — STIPULATION. A stipulation by the parties to the action, that "the evidence taken upon the previous trial of the above action be read at Trial Term as the evidence in this action, and that no further evidence shall be introduced on either side outside of that which

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is contained in the case on appeal, determined by the General Term of this court," confers upon each the absolute right to rely upon the stipulated record as a complete record, and to take the benefit of whatever it presents as evidence.

Ryan v. Mayor, 7 App. Div. 336, affirmed.

(Argued October 28, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 28, 1896, which affirmed a judgment in favor of defendant entered upon a dismissal of the complaint at a Trial Term, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. E. Warren for appellant. The court erred in dismissing plaintiff's complaint and refusing to allow the case to go to the jury. (*Gregory v. Mayor, etc.*, 113 N. Y. 416; *Alker v. Mayor, etc.*, 27 Hun, 413; *McCoy v. Mayor, etc.*, 46 Hun, 268; *Ryan v. Mayor, etc.*, 91 Hun, 470.) The letter from the division engineer requesting the resignation of Ryan did not constitute a discharge. (*Vanderhoef v. A. Ins. Co.*, 46 Hun, 328.) The statute did not authorize the board of commissioners to suspend or enter into any contract with inspectors, except to hire, discharge and fix the amount of the salary. (L. 1883, ch. 354; L. 1884, chs. 357, 410; L. 1886, ch. 29; *People ex rel. v. Civil Service Bds.*, 41 Hun, 287; *Gregory v. Mayor, etc.*, 113 N. Y. 421.) It was error to admit in evidence the letters of the division and chief engineer to each other respecting the case of Ryan. (*Gregory v. Mayor, etc.*, 113 N. Y. 416; *Emmitt v. Mayor, etc.*, 128 N. Y. 117.)

James H. Ward for respondent. On the facts, the letter from the division engineer to the plaintiff's intestate, dated October 28, 1887, written by due authority, was in law a discharge, and required a direction of the verdict. (*Ryan v. Mayor, etc.*, 86 Hun, 224; 91 Hun, 470; *Lethbridge v.*

Mayor, etc., 133 N. Y. 232 · *Wardlaw v. Mayor, etc.*, 137 N. Y. 194.)

GRAY, J. Ryan, plaintiff's testator, sued to recover his salary as an inspector of masonry upon the New Aqueduct, in New York city, for a period of time from October, 1887, to December, 1889. He had been employed for a few months, when charges were made by the division and the chief engineers against him for intoxication and insubordination. In consequence, the board of aqueduct commissioners directed the chief engineer to ask for his immediate resignation. On October 28th, 1887, he received the following letter :

"Mr. WILLIAM RYAN, Inspector :

"DEAR SIR.—

"I have to-day received from the chief engineer, Mr. B. S. Church, a letter stating that your case has been considered by the aqueduct commissioners at their meeting on the 26th inst., and they have asked that the resignation of William Ryan be demanded forthwith. I hereby call upon you for your resignation forthwith.

ALFRED CRAVEN,

"Division Engineer."

On December 19th, 1889, he was served with formal notice of his dismissal from the service.

The question is whether the letter of October 28th, 1887, operated, and was regarded by Ryan, as his discharge. That it was the intention of his superiors to terminate his employment cannot be doubted ; but the appellant contends, in effect, that there was no actual discharge until the notice of December, 1889, and that whether what took place before that was understood by the parties to be a discharge, was a question as to which the evidence furnished conflicting inferences, which should have been left to be settled by the jury. Hence, it is argued that it was error for the trial judge to direct the verdict for the defendant. The evidence, however, was not, in our judgment, susceptible of any other inference than that Ryan understood that he was discharged in October, 1887,

from the service. It is without conflict as to the occurrences and is to the effect that Ryan frequently called at the office of the aqueduct commissioners and that he "wanted" or "asked" to be "reinstated." It was not shown that he reported for duty, or performed, or offered to perform, any services after receiving the letter of October 28th, 1887. In the light of such evidence, what ground is there for the inference that Ryan understood that he was still in the service? Failure to report for duty and demands for reinstatement pointed but to the one conclusion, that he understood that he had been discharged, and had the jury given a verdict upon such evidence for the plaintiff, it would have been the duty of the court to set it aside, as being quite without support.

There was no question about the power to dismiss the inspector for a neglect of duty, and it is immaterial what was the language used to effect his dismissal; provided it was so understood by him. The letter of October, 1887, did not use the word "discharge," but that Ryan's services were no longer desired was as plain as language could express it. It cannot be for an instant doubted but that, had he attempted to remain and to perform services, he would have been peremptorily and formally dismissed. We held in the *Wardlaw Case* (137 N. Y. 194), that it was competent for the parties to treat a letter as a discharge, although not technically a good discharge and the word "discharge" may not have been used. No particular form of words was necessary to accomplish that result. Ryan, plainly, took this letter of October, 1887, as such; or something would have been shown as having been done by him to indicate that he did not so understand it. It was, undoubtedly, sought to spare him the disgrace of a peremptory dismissal, by the request for his resignation forthwith, and there is not the slightest reason to believe that, though he did not in fact send it in, he did not understand that his services were no longer desired and that he was discharged from his office.

The appellant argues that it was error to admit in evidence certain letters passing between the chief and the division

engineers, relating to Ryan's misconduct in office and to the action taken by the commissioners upon the charges. Without discussing their competency, it is sufficient to say that under the stipulation in the case they were made admissible. The stipulation of the parties was that "the evidence taken upon the previous trial of the above action be read at Trial Term as the evidence in this action, and that no further evidence shall be introduced on either side outside of that which is contained in the case on appeal, determined by the General Term of this court December, 1895." These letters, upon the previous trial, had been put in evidence by the plaintiff, without objection by the defendant, and so appeared in the former record, as introduced upon the present trial. In reading that record, the plaintiff's counsel appears not to have actually read them; whereupon defendant's counsel then offered to read them, as part of the city's case, and the plaintiff's counsel objected to them as being incompetent declarations, etc. The trial court admitted them, as being entitled to be read under the stipulation, and was clearly right in so ruling. As it was said at the Appellate Division, the defendant had an absolute right to rely upon that stipulation as binding the plaintiff as well as itself to the whole of the record as there presented, either party having the benefit of whatever that record presented as evidence. It meant that the parties would regard that as a complete record, available to either, and upon which the final determination of the issues should be predicated.

The judgment appealed from should be affirmed, with costs.
All concur.

Judgment affirmed.

EMMA CONDIT SMITH, as Testamentary Guardian, etc., Appellant, v. CENTRAL TRUST COMPANY of New York et al., Respondents.

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163	416
154	333
165	95

1. COURTS—ADJUDICATION OF CREATION OF TESTAMENTARY TRUST.

When a court of equity, in a proceeding for that purpose, appoints a person trustee "to execute the trusts mentioned and declared" in a will, it necessarily adjudges that a trust was created by the will.

2. JUDICIAL PROCEEDINGS OF ANOTHER STATE—JURISDICTION. An undisturbed adjudication by a court of another state, that a trust was created by a will, as the basis of the appointment of a trustee, is binding upon the courts of this state, in an action attacking the trusteeship, by force of the constitutional and statutory provisions requiring the courts of each state to recognize the judicial proceedings of other states (U. S. Const. art. 4, § 1; U. S. R. S. 170, § 905), providing the court had jurisdiction to make the adjudication.

3. WANT OF JURISDICTION. A judgment of a court of another state is always open to impeachment for the want of jurisdiction over the subject-matter or the parties.

4. JURISDICTION OF SUBJECT-MATTER. The Court of Chancery of New Jersey has jurisdiction of the subject-matter of the appointment of a testamentary trustee, when the fundamental question for determination is whether a trust was created by the will of a testatrix who resided in that state at the time of her death, and the beneficiaries (being her infant children) lived there, and the will was executed and proved, and the estate settled there.

5. JURISDICTION OF PARTIES—PRESUMPTION. When the record of a court of general jurisdiction of another state (such as the record of the Court of Chancery of New Jersey in a proceeding for the appointment of a testamentary trustee for infant beneficiaries) discloses nothing in regard to the service of notice, and no evidence is given upon the subject, and there is nothing, either of record or otherwise, to show that every step essential to jurisdiction was not duly taken, it will be presumed that the court had jurisdiction of the persons of the parties, acquired by the service of all notices necessary.

6. COSTS. A case for the payment of costs of appeal, by a testamentary guardian personally, is presented where the guardian has persisted in unsuccessfully litigating the right to the control of securities held by a testamentary trustee, after continuous failure in many other actions having the same object.

Smith v. Central Trust Co., 12 App. Div. 278, affirmed.

(Argued October 28, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1896, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought by the plaintiff, as the testamentary guardian of Louise Condit and Sallie Barnes Smith, infants of tender years, to compel a corporation which is alleged to hold certain securities in trust for them, to account for the interest by it collected thereon and for other relief.

In July, 1890, Mrs. Sallie L. D. B. Smith, a resident of New Jersey, died, leaving a husband, said two daughters, a large amount of personal property and a will, by which, after some minor bequests, she gave one-half of the residue of her estate to her husband, George Condit Smith, and the other half to her children "absolutely" in equal shares, and directed that her husband should "hold the same in trust for such child or children during its or their minority, managing and investing the same according to law and from time to time applying such parts of the income thereof to the support, maintenance and education of such child or children, as he may think advisable; the determination of my husband as to such management, investment and application of income shall be final and without appeal or question, as I have full confidence in his good sense and discretion." She appointed her husband as her sole executor, and expressed the desire that he should "not be required to give any security for the performance of his duties, either as executor or as trustee." This will was admitted to probate before the surrogate of Essex county, New Jersey, on the 28th of July, 1890, and letters testamentary were issued thereon to George Condit Smith, who, after finally accounting before said surrogate and in December, 1890, and May, 1891, deposited with the defendant, the Central Trust Company of the city of New York, the securities in question, consisting of railway bonds, upon the condition expressed in a writing signed by him as "executor and trustee," that it should act as custodian of such securities until his children should become of age, collect the interest thereon

and pay it to him while he lived, and after that to their guardian to be appointed by his will or by some court of competent jurisdiction. As the children became of age the securities were to be delivered to them. After changing his residence from the state of New Jersey to the state of New York, he died in New York city in October, 1894, leaving a will whereby he appointed the plaintiff, his second wife, the guardian of his children, who resided with him in this state up to the time of his death. His will was admitted to probate in the county of New York on the 31st of January, 1895. In the meantime, and on the 16th of October, 1894, upon the petition of said infants through their uncle, as their next friend, the Court of Chancery of the state of New Jersey appointed William Pennington, of the city of Paterson in that state, trustee for said infants "in the room and stead of George Condit Smith, deceased, to execute the trusts mentioned and declared in and by the last will and testament of Sallie Smith, deceased, * * * with all the rights, powers, duties and privileges incident to the appointment." Mr. Pennington promptly qualified by giving two bonds in the penalty of \$60,000 each, and thereupon notified the trust company not to deliver the securities, or pay the income to any one except himself. On the fourth of April, 1896, this action was commenced by the plaintiff, as such testamentary guardian, against the Central Trust Company alone, but on the tenth of August following, pursuant to an order of the Appellate Division, the summons was so amended as to include Mr. Pennington as such trustee. (7 App. Div. 278.) The relief demanded by the amended complaint was that said Pennington should be adjudged to have no interest either in the bonds or income, and that the defendant company should be required to account for and pay over to the plaintiff all accumulations of interest in its possession derived from said securities. Both defendants answered, setting up the foregoing facts, in substance, and Mr. Pennington demanded that the complaint should be dismissed, while the trust company asked for an adjudication in respect to the conflicting claims of

the other parties to the action. The trial judge dismissed the complaint and adjudged that the trust company held the bonds subject to the order of William Pennington, as trustee, and that it should pay over to him, as such, the accrued interest. The Appellate Division unanimously affirmed the judgment on the ground that the order made by the Chancellor of New Jersey appointing Mr. Pennington as trustee was valid and could not be attacked in this state for irregularity, but only for want of jurisdiction. (12 App. Div. 278.) The plaintiff thereupon appealed to this court.

Alex. Thain for appellant. The Special Term was in error in assuming that the Appellate Division had already decided that the fund in question was held under a trust created under the laws of the State of New Jersey. (*Smith v. Central Trust Company*, 7 App. Div. 278; *Hoffman v. Wight*, 1 App. Div. 514; *Wilcox v. Jackson*, 13 Pet. 511.) The property in question is in the state of New York, and its owners reside here, subject to the jurisdiction of the courts of this state. (Story on Conflict of Laws, §§ 481, 500, 504; *Parsons v. Lyman*, 20 N. Y. 103; *Channel v. Chapen*, 46 Ill. App. 234; *Frank v. Morehead*, 31 Atl. Rep. 1016; *Woodbridge v. McKenna*, 8 Fed. Rep. 650; *Williams v. Ritchie*, 3 Dill. 406; *Ruckman v. Palisade Co.*, 1 Fed. Rep. 367; *Leonard v. Putnam*, 51 N. H. 247; 12 Am. Rep. 106; *Lacy v. Williams*, 27 Mo. 280; *Herring v. Goodson*, 43 Miss. 392; *Ware v. Coleman*, 6 J. J. Marsh. [Ky.] 198; *Sears v. Terry*, 26 Conn. 273; *Morrell v. Dickey*, 1 Johns. Ch. 153.) No trust was created by the will of Mrs. Sallie Smith. (*Weiland v. Townsend*, 33 N. J. Eq. 393; 2 Washb. on Real Prop. 162, 163, 166; 2 Perry on Trusts, § 304; Willard's Eq. Juris. [Potter's ed.] 410; *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392; *Rice v. Harbeson*, 63 N. Y. 493.) The use of the word "trust" did not necessarily indicate an intention to create a trust, other than was implied in the appointment of a guardian of the estate. (*In re Hawley*, 104 N. Y. 250; 2 Story's Eq. Juris. § 1330; 2 Perry on Trusts, § 298; Redf.

on Sur. 271; *Bacon v. Bacon*, 4 Dem. 5; *In re Embree*, 9 App. Div. 602; *Cook v. Fountain*, 3 Swanst. 585.) The authority to the husband was at most a naked power peculiar to himself, which did not survive. (Willard's Real Estate [2d ed.], 250, 251; 2 Wash. on Real Prop. 322, § 23; 4 Kent's Comm. 326; 2 Perry on Trusts, §§ 496, 499; *Chambers v. Tulane*, 1 Stock. [N. J.] 146; *Conklin v. Egerton's Admr.*, 21 Wend. 432; 25 Wend. 224; *Henderson v. Henderson*, 113 N. Y. 1; *Stoutenburgh v. Moore*, 10 Stew. [N. J.] 63; *Brush v. Young*, 4 Dutch. [N. J.] 237; *Lanning v. Sisters of St. Francis*, 8 Stew. [N. J.] 392.) Defendant Pennington's appointment was procured by fraudulent misrepresentation and concealment of material facts. (*Titley v. Wolstenholme*, 7 Beav. 425; *Dias v. Brunell's Exr.*, 24 Wend. 9.) The complaint should not in any aspect of the case have been dismissed, as plaintiff is entitled to know where her ward's property is, what its condition and of what it consists, regardless as to which of the defendants may hold the securities. (Tyler on Infancy, 260, § 175; *Lane v. Mickle*, 46 Ala. 600; *Covington v. Leake*, 76 N. C. 363; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Beecher v. Crouse*, 19 Wend. 306; *Van Camp v. Searle*, 147 N. Y. 150; *Curtis v. Smith*, 6 Blatch. 537.)

John Brooks Leavitt for respondents. The appeal is frivolous, as no question of law is presented thereby, and the will under discussion has been construed adversely to plaintiff's claims by many different courts. (*Pennington v. Smith*, 69 Fed. Rep. 188; *Smith v. C. T. Co.*, 7 App. Div. 278; *Pennington v. Smith*, 75 Fed. Rep. 157; *Smith v. Pennington*, 12 App. Div. 378; *Smith v. Cent. Trust Co.*, 12 App. Div. 278.)

VANN, J. When the Court of Chancery of the state of New Jersey appointed Mr. Pennington trustee for said infants in the place of their deceased father "to execute the trusts mentioned and declared" in their mother's will, it adjudged that a trust was created by that will, for that question had to be decided in order to determine whether a trustee should be

appointed. (*Caujolle v. Ferrie*, 13 Wall. 465, 472.) It was the foundation upon which the decision to appoint a trustee necessarily rested. If that court had jurisdiction to make the determination it is binding upon us, even if we are of the opinion that, in fact, no trust was created, but simply a power, because the Federal Constitution provides that "full faith and credit shall be given in each state to the * * * judicial proceedings of every other state," and that Congress may by general laws prescribe the method of proving such proceedings and the effect thereof. (U. S. Cons. art. IV, § 1.) Pursuant to this authority, Congress has enacted that judicial proceedings in another state shall have the same effect in every court within the United States as they have by law or usage in the courts of the state in which they were taken. (U. S. R. S. p. 170, § 905.)

A judgment rendered by the courts of another state, however, is always open to impeachment for the want of jurisdiction either over the subject-matter or the parties. Jurisdiction over the subject-matter of an action or judicial proceeding, as was held in *Hunt v. Hunt* (72 N. Y. 217), is the power to adjudge, concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or to the ultimate existence of a good cause of action. The subject-matter of the proceeding in question before the Chancellor of New Jersey was the existence of a trust and the appointment of a trustee thereunder. Whether a trust was created by the will of the testatrix, who not only resided in the state of New Jersey at the time of her death, but her children lived there, and her will was executed and proved, and her estate settled there, was clearly a question that the Chancellor had the power to decide, and if he erred in his decision the remedy was by appeal, or by a motion before that judge to vacate his own order. The latter remedy appears to have been recently resorted to by the plaintiff, but her petition, as testamentary guardian of said infants, addressed to the Chancellor, was dismissed by him with costs, upon the ground, as stated in a certified copy of the order presented

upon this appeal, that a trust was created by the will of Mrs. Smith, and that the trustee previously appointed was a suitable and proper person for the position.

It is insisted, however, that this determination may be reversed upon the appeal that is said to have been taken therefrom, and that hence it is our duty to decide whether the Court of Chancery, as represented by the Chancellor, had jurisdiction of the persons of the infants when the former order was made. Jurisdiction in this regard is challenged, not upon the ground that no notice was served upon them personally, but because, as it is alleged, no notice was served upon the person with whom they resided. It has been held, however, by this court, that "in a proceeding simply for the appointment of a trustee to execute trust duties and powers, for the faithful performance of which security is always required, it is a matter of discretion with the court as to whom notice shall be given. The court in which the application is made may determine and direct in that regard; the appointment being always open to review on the application of any party interested, and who may not have been informed of the proceeding." (*Matter of Robinson*, 37 N. Y. 261, 264.) But, as the existence of a trust was not conceded, let us assume not only that notice to the beneficiaries was essential to jurisdiction, but also that such notice should have been served upon the plaintiff, as the person with whom the infants lived, while both she and they were within the state of New Jersey. Upon this assumption, as the record before us is silent upon the subject, resort must be had to presumptions. The plaintiff in her complaint simply alleges, upon information and belief, that Mr. Pennington, although claiming to be trustee, is not such and has no interest in the securities or income. The defendants allege that he is trustee, and attach to their respective answers a copy of the will and of the order of appointment, which, together with the petition of the next friend and the affidavits and letters of relatives accompanying, were all the evidence relating to the subject introduced upon the trial, except the certificate of the clerk that the

trustee had given the bonds required by the order. There is nothing to show that these papers constitute the entire record upon which the Chancellor acted, or what notice, or that no notice was given to the beneficiaries, or to any person for them. No offer was made by either party to show notice or the want of notice, and the plaintiff did not object to the petition or order upon the ground that notice was not given or that it did not appear whether notice was given or not. The only recital in the order is as follows, viz.: "Upon reading and filing the petition in this case, and upon hearing the statements of counsel, it is ordered," &c. Thus we have an order, made by a court of general jurisdiction, with proof of some papers upon which it was founded, but with no proof that they were the only papers, and nothing, either of record or otherwise, to show that every step essential to jurisdiction was not duly taken. Under these circumstances, the presumption is that a court of general jurisdiction proceeded to judgment only after duly acquiring jurisdiction by the service of all notices actually necessary. (*Yates v. Lansing*, 9 Johns. 396, 437; *Shumway v. Stillman*, 4 Cow. 292, 296; *S. C.*, 6 Wend. 447; *Foot v. Stevens*, 17 Wend. 488; *Pacific Pneumatic Gas Co. v. Wheelock*, 80 N. Y. 278; 2 Black on Judgments, § 835.) As was said by the late Court of Errors in *Yates v. Lansing* (*supra*), "An inferior court shall, when questioned, show that it acted within its jurisdiction. Whereas in courts of general jurisdiction, jurisdiction is presumed until the contrary is shown." (p. 437.) The same rule is stated in an early English case in these words: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." (*Peacock v. Bell*, 1 Saund. 73, 75.) The Supreme Court of the United States, speaking upon the same subject in an important case, said: "A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly.

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All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. * * * But the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged in to supply the absence of evidence, or averments, respecting the facts presented. They have no place for consideration when the evidence is disclosed or the averment is made." (*Galpin v. Page*, 18 Wall. 350, 365.) When the record of a court of general jurisdiction discloses nothing in regard to the service of process or notice, and no evidence is given upon the subject, jurisdiction over the person will be presumed, because the record itself imports sufficient proof of jurisdiction without disclosing the different steps by which such jurisdiction was acquired. When it affirmatively appears, however, that any essential step was omitted, the presumption in favor of jurisdiction is destroyed and a presumption against jurisdiction at once arises. Within these rules, which are old and familiar, as there is nothing in the record, or elsewhere, so far as appears, to show that the Court of Chancery did not have jurisdiction of the person, and, as we have seen, it clearly had jurisdiction of the subject matter, effect must be given to the usual presumption that obtains in such cases by affirming the judgment appealed from.

The plaintiff has shown great zeal and persistence in her efforts to obtain control of the securities in question, as appears by many reported cases which record continuous failure on her part. (*Pennington v. Smith*, 69 Fed. Rep. 188; 75 Fed. Rep. 157; 78 Fed. Rep. 399; *Smith v. Central Trust Co.*, 7 App. Div. 278; *Smith v. Pennington*, 12 App. Div. 378.) Under these circumstances we think that the costs of this appeal should be paid by her personally.

All concur.

Judgment affirmed.

In the Matter of the Application of W. HAMPTON WARDE,
for Leave to Qualify as a Law Student under the Rules of
1892.

1. RULES OF COURT — AMENDMENTS. The amendments of the rules of the court are analogous to the amendments of the statutes and should receive the same construction.

2. AMENDMENTS — CONSTRUCTION. The rule of statutory construction — that when a statute is amended by enacting that it “is amended so as to read as follows,” and then incorporating the changes and additions, with so much of the former statute as is retained, the part which remains unchanged is to be considered as having been continued the law from the time of its original enactment — applies to amendments of the rules of the court.

3. RULES FOR ADMISSION OF ATTORNEYS — AMENDMENTS. The amendments made December 2, 1895, to the Rules for the Admission of Attorneys, which retained unchanged the following italicized clauses in subdivision 7 of rule 6, adopted October 22, 1894: *A law student whose clerkship or attendance at a law school has already begun* may, at his option, file or produce, instead of the certificates required by these rules, *those required by the rules of the Court of Appeals, adopted October 28, 1892*, did not have the effect of making the words “has already begun,” refer to the date of the taking effect of the amendments, namely, January 1, 1896, but left them continuing to speak as of the date when they originally went into effect, namely, January 1, 1895.

4. RULES OF 1892. The privilege of proceeding under the rules of 1892, conferred by subdivision 7 of present rule 6, does not apply to any law student whose clerkship or attendance at a law school commenced after the 1st day of January, 1895, but all such students must conform to the later rules.

5. REGENTS' CERTIFICATE. A law student whose clerkship or attendance at a law school commenced after the 1st day of January, 1895, cannot be admitted to examination for admission, upon producing a regents' certificate under the rules of 1892.

(Submitted November 7, 1897; decided November 23, 1897.)

HAIGHT, J. The petitioner, W. Hampton Warde, began his law clerkship on the 25th day of April, 1895. He now asks to be admitted to an examination upon producing a regents' certificate under the rules of 1892.

On the 22d day of October, 1894, rules of this court were adopted, to take effect on the first day of January, 1895, pro-

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viding that "applicants for examination shall be deemed to have studied law within the meaning of these rules *only* when they have complied with the following terms and conditions, viz.: 3. Applicants who are not graduates or members of the bar as above prescribed shall, before entering upon the clerkship or attendance at a law school herein prescribed, or within one year thereafter, have passed an examination conducted under the authority and in accordance with the ordinances and rules of the university of the state of New York, in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or in their substantial equivalents as defined by the rules of the university." (Rule 5.)

It was further provided that "a law student whose clerkship or attendance at a law school has already begun, as shown by the record of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his option, file or produce instead of the certificates required by these rules, those required by the rules of the Court of Appeals, adopted October 28, 1892." (Rule 6, subdivision 7.)

The course of study prescribed by the rules of 1894 was materially enlarged and embraced studies not included in the rules of 1892. The new rules applied to all students except those whose clerkship, or attendance at a law school, had theretofore begun. It consequently follows that all students whose clerkships or attendance at a law school commenced after the first day of January, 1895, were required to conform to the rules then in force.

On the 2d day of December, 1895, the rules of this court were again amended, to take effect on the first day of January, 1896. Numerous amendments were incorporated into the rules, but the provisions which we have quoted from the *rules* of 1895 remained unchanged, except that the word "proofs" was substituted for "certificates." It is now claimed that subdivision seven of rule six was, in effect, readopted in the new rules, to take effect on the 1st day of January, 1896, and

that the effect is to give the students the right of option to qualify under the rules of 1892. Such was not our intention, and we do not understand it to be the legal effect of the amendments. The amendments of the rules of the court are analogous to the amendments of the statutes and should receive the same construction.

In the case of *Ely v. Holton* (15 N. Y. 595) it was held that the effect of an amendment to a statute, made by enacting that the statute "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, is not that the portions of the amended statute which are merely copied without change are to be considered as having been repealed and again re-enacted, nor that the new provisions, or the changed portions, should have been deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having been continued the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the passage of the amendment. The rule adopted in this case was followed in the case of *Moore v. Mausert* (49 N. Y. 332), and again in the case of *Benton v. Wickwire* (54 N. Y. 226). In the latter case, REYNOLDS, C., in delivering the opinion of the court, says: "There was once, and long ago, a rule in the construction of statutes, that an amendment of it was to be regarded as if having been incorporated in and made a part of the original enactment, but that rule has been for a long time disregarded, and it is now settled that an amendment has no more retroactive effect than an original act upon the same subject." (Citing *Ely v. Holton*, *supra*.)

The petitioner having commenced his law clerkship after the rules of 1895 were in force, must conform to the requirements of those rules as to the production of a regents' certificate.

This motion must, therefore, be denied.

All concur.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
HADLEY ADOLPHUS SUTHERLAND, Appellant.

154	846
159	858
154	845
161	876

1. **MURDER — EVIDENCE.** The facts as to the shooting of his paramour by the defendant reviewed and *held* to disclose sufficient evidence of intent, deliberation and premeditation to sustain the verdict of murder in the first degree.

2. **CONCLUSIVENESS OF VERDICT.** The verdict, in a capital case, is conclusive upon the Court of Appeals on questions of fact, where there is a conflict in the evidence, or where opposing inferences are to be drawn from the facts.

3. **APPEAL — INTERFERENCE WITH VERDICT.** When it appears that the facts and circumstances testified to justified the jury in finding that the homicide was intentional, and that it was the result of sufficient deliberation and premeditation to warrant the verdict of murder in the first degree, the Court of Appeals will not interfere with the determination of the jury upon the facts.

4. **MOTIVE.** While an adequate motive for the act is not indispensable to a conviction of murder, yet any fact from which the jury may legitimately find or infer such motive acting upon the defendant's mind is competent.

5. **MERETRICIOUS RELATIONS.** On a trial for the murder of a woman by a man, proof of meretricious relations between the parties and of the facts leading up to such relations is competent, where it tends to show a motive for the act.

6. **POSSESSION OF WEAPON — INTENT.** On a trial for murder by shooting with a pistol, testimony that the defendant, shortly before the homicide, showed the witness the pistol, with the remark, "This means business some day," is competent as tending to prove not only that the defendant had the pistol in his possession, but that he intended to use it upon some one.

7. **LETTERS FROM DECEASED TO DEFENDANT — MOTIVE.** On the trial of a man for murdering his paramour, who was pregnant at the time, letters received by the defendant from the woman, indicating that she considered him the father of her child and apprising him of her dependence upon him and that she considered their relations permanent, although affectionate in tone, may be admissible against him, not for the purpose of proving any fact stated in them, but as bearing upon the question whether the situation in which the defendant was placed, as depicted in the letters, furnished a sufficient motive for him to terminate the relations in the way he did.

8. **LETTERS OF DECEASED — EVIDENCE.** Letters of the deceased, sent to the defendant and found in his possession, are not, as matter of law,

incompetent evidence under all circumstances, on a trial for murder, as being only statements of the deceased; but their competency depends upon their contents and the nature of the information which they convey to the mind of the accused.

9. **HARMLESS EVIDENCE.** The admission in evidence, on a trial for murder, of letters from the deceased, found in the defendant's possession, does not constitute reversible error, even if the letters contain nothing bearing upon the question of motive, unless they contain something calculated to prejudice the defendant.

(Argued October 20, 1897; decided November 23, 1897.)

APPEAL from a judgment of the County Court of Kings county convicting defendant of the crime of murder in the first degree, entered upon a verdict April 19, 1897.

The facts, so far as material, are stated in the opinion.

Arthur H. Cameron for appellant. The motions to set aside the verdict as clearly against the evidence and for a new trial should have been granted, and the court erred in denying them. (*People v. Cignarale*, 110 N. Y. 26; *People v. Taylor*, 138 N. Y. 398; *People v. Hoch*, 150 N. Y. 291.) The court erred in admitting the testimony of George T. Wren and Jasper Washington, and in permitting the district attorney to refer in his opening to the relations of the defendant with Sarah Wren and her husband in New York city. (*People v. Corey*, 148 N. Y. 476.) The court erred in admitting in evidence the letters from Sarah Wren to the defendant. (*People v. Green*, 1 Park. Cr. Rep. 11; *Willett v. People*, 27 Hun, 469; *Frank v. Brewer*, 26 N. Y. S. R. 590; *Bank of B. N. A. v. Delafield*, 126 N. Y. 410; *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274; *Martin v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 626; *People v. Corey*, 148 N. Y. 476.) The defendant should not have been cross-examined as to his past history, and especially as to such parts of it as referred to his liaison with Sarah Wren, and the court erred in permitting it. (*People v. Tice*, 131 N. Y. 657; *People v. White*, 14 Wend. 111.) The defendant should not have been cross-examined as to where or from whom he bought the revolver and

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cartridges, and the court erred in permitting it. (*People v. Tice*, 131 N. Y. 657.)

Herman H. Baker for respondent. The verdict of the jury was abundantly supported by the evidence, and it cannot be contended that the evidence did not justify their finding. (*People v. Cignarale*, 110 N. Y. 23; *People v. Driscoll*, 107 N. Y. 414; *People v. Kelly*, 113 N. Y. 647; *People v. Stone*, 117 N. Y. 480; *People v. Trezza*, 125 N. Y. 740; *People v. Tice*, 131 N. Y. 651; *People v. Kerrigan*, 147 N. Y. 210; *People v. Corey*, 148 N. Y. 476; *People v. Taylor*, 138 N. Y. 398; *People v. Hoch*, 150 N. Y. 291; *People v. Youngs*, 151 N. Y. 210.) The testimony of the witnesses George T. Wren and Jasper Washington was properly admitted. (*People v. Harris*, 136 N. Y. 423; *State v. Watkins*, 9 Conn. 46; *People v. Stout*, 4 Park. Cr. Rep. 71; *Hendrickson v. People*, 10 N. Y. 13.) After the shooting, certain letters written by the deceased to defendant were found among his effects. These were properly received in evidence. (*Willett v. People*, 27 Hun, 469; *People v. Tice*, 131 N. Y. 651; *Hendrickson v. People*, 10 N. Y. 13; *People v. Casey*, 72 N. Y. 394; *Le Beau v. People*, 34 N. Y. 223; *Real v. People*, 42 N. Y. 270.) After hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Pro. § 542; *People v. Chacon*, 102 N. Y. 669; *People v. Buddensieck*, 103 N. Y. 487; *People v. Fanning*, 131 N. Y. 659; *People v. Youngs*, 151 N. Y. 210.)

O'BRIEN, J. It is undisputed that, on the night of the 22d of March, 1897, the defendant, a young colored man about 19 years of age, shot and killed one Sarah Wren, in an apartment house in Brooklyn, where they lived. The deceased was the wife of another man, and she was at the time living with the defendant in meretricious relations. The only question in the case, upon the merits, is whether the evidence produced

upon the trial was sufficient to establish the intent to kill and the deliberation and premeditation essential to constitute the crime of murder in the first degree. The learned counsel for the defendant contends that the shooting was not accompanied by the intent, or the deliberation and premeditation necessary to constitute the crime of which he was convicted; and he insists that this court should set aside the verdict as unsupported by sufficient evidence. In this view of the case it becomes necessary to state some of the leading facts which preceded the tragedy.

It appears that the defendant's relations with the deceased commenced while she was living with her husband, and that about a month after the birth of a child she abandoned her husband and with the child took up her abode with the defendant. The proof tended to show that on the evening of the homicide the defendant had been drinking; that for some reason, which does not distinctly appear, a quarrel took place between him and the deceased. The parties lived on the first floor of the house, which consisted of a front room or parlor, a kitchen in the rear and a hall bedroom opening into the kitchen and a hallway. The hall bedroom was occupied by the defendant and the deceased. The parlor and kitchen were occupied by other parties, all colored people; but what particular rooms, if any, had been assigned to each does not distinctly appear. The fair inference is that all the inmates used the rooms to some extent in common. The quarrel commenced in the front room or parlor. The parties then retired to the bedroom where it seems to have been continued. The defendant assaulted and struck the deceased, at least two or three times during the quarrel, and the deceased in the end seems to have taken refuge in the front room. The defendant then went into the kitchen, dressed himself and was heard to say that he did not care what became of himself. Then going into the bedroom, which the deceased had left, he almost immediately fired a shot from a pistol, the bullet entering the ceiling of the bedroom. The prosecution claims that this shot was fired by the defendant for the purpose of testing the

weapon, or at least of making sure that he understood how to handle it. After firing this first shot the defendant then came out of the bedroom and standing in the doorway between the kitchen and front room fired the second shot at the deceased, who was near a front window and in line with one of the other women. This shot missed her, striking a picture on the wall near her. The two women then rushed out of the room, passing through the hall towards the street, when the defendant fired a third shot, which also missed, and passed through the wall into an adjoining apartment. The women, for there were then three of them, continued running towards the front door, followed by the defendant. The deceased, who was ahead, fell in attempting to reach the street, and one of the other women also fell. The defendant passed the two who were behind and reached the deceased while she was down and fired the fourth shot, which entered her lungs and lodged in the region of the heart, producing instant death. There is some conflict in the testimony as to the order in which the three women were passing or running out of the hall to the stoop into the street, and with respect to the defendant's position when he fired the fatal shot. But it is undisputed that the night robe of the deceased, her undergarments and her skin where the bullet entered were burned by the discharge, showing clearly that the firing was at short range, if, indeed, the muzzle of the pistol did not come in contact with her body. The defendant then fired a fifth shot at a policeman who was approaching, missing him, and then fled. He threw away his pistol in the street and ran a couple of blocks, when he was captured without resistance. On being told what he had done, he did not attempt to explain or deny it. He asked the officers if she was dead, and when they asked why he shot her he answered: "I am jealous of her * * * She is four months in the family way and accuses me, and I know there are other men who have been with her." The revolver which he used had five chambers, and when found contained five empty cartridges.

Upon these facts the question of intent, deliberation and

premeditation was clearly for the jury. It is difficult to see how the defendant's act could be attributed to accident or mischance. The fact that one of the shots entered the ceiling of the bedroom and that two others missed, is of very little consequence, if it be true, as the testimony certainly tended to show, that the defendant pursued the deceased and deliberately fired a fourth shot into her body at such close range as to burn her clothing.

It is undoubtedly true that this court has power in a capital case to review the facts and to set aside a verdict of conviction when not supported by sufficient evidence, or when it appears that injustice has been done. But where there is a conflict in the evidence, or where opposing inferences are to be drawn from the facts, it is the province of the jury to determine what the truth is, and the verdict, under such circumstances, is conclusive upon the courts. The evidence in this case would hardly warrant a verdict that the shooting was without intent to kill, or without deliberation and premeditation. The facts and circumstances testified to justified the jury in finding that the shooting was intentional, and that it was the result of sufficient deliberation and premeditation on the part of the accused to warrant the verdict. We think, therefore, that this court under such circumstances would not be warranted in interfering with the determination of the jury upon the facts.

There are three exceptions in the record which have been argued by the defendant's counsel, and which require a brief notice. The husband of the deceased was sworn as a witness and testified to their marriage; how the defendant became acquainted with his wife, and the fact that he frequently visited her at their home; that shortly after the birth of the child the wife disappeared and the witness did not see her again until her death. It was competent for the prosecution to prove the fact that the deceased was the wife of another man; that the defendant had enticed her away from her husband and was living in meretricious relations with her at the house where the offense was committed. The defendant certainly knew that the deceased was untrue to her husband,

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and there was evidence in the case from which the jury might find that he suspected that she was also untrue to him; that jealousy and ill-feeling were the result of these suspicions which might have furnished a possible motive for the commission of the offense. The relations of the parties to each other and the facts leading up to such relations were competent for the consideration of the jury. While an adequate motive for the act is not indispensable to a conviction, yet any fact from which the jury might legitimately find or infer such motive acting upon the defendant's mind was competent.

The prosecution proved by a witness who had a conversation with the defendant the afternoon of the day of the shooting that he showed her a pistol, remarking at the same time that, "This means business some day." The testimony of this witness tended to prove, not only that the defendant had the pistol in his possession at the time, but that he intended to use it upon some one. Whether for the purpose of protecting himself against the husband of the woman with whom he was living, or upon the deceased, was for the jury to say, under all the circumstances of the case. It has been suggested that this was a mere idle or boastful remark, but we cannot affirm that such was the fact as matter of law.

The prosecution put in evidence a number of letters written by the deceased to the defendant at various times during the period after the deceased had separated from her husband and attached herself to the defendant. They were found in the defendant's trunk after the homicide, and were admitted in evidence under objection and exception from the defendant's counsel. The letters appear on their face to be of the most affectionate character and manifest a deep interest on the part of the writer in the defendant's welfare. They indicate very clearly that she understood the defendant to be the father of her child. It appeared from other evidence in the case that the deceased, at the time of her death, was pregnant, and that the defendant knew it. We think that the trial court committed no legal error in admitting these letters in evidence. They were, perhaps, not admissible for the purpose

of proving any fact stated in them, but only for the purpose of showing how the deceased regarded her relations with the defendant. The letters must have presented to his mind a true picture of his real situation. Though still but 19 years of age, and unmarried, they could not fail to impress him with the thought that, in a certain sense at least, he had assumed all the burdens and responsibilities of a family. Though the letters, as already stated, were couched in the most affectionate terms, they apprised him of the claims which the deceased made and of her dependence upon him. Whether the situation in which he was placed, as depicted in these letters, furnished a sufficient motive for him to terminate the relations in the way that he did, was a question for the jury.

The motive for the commission of a homicide is always open to inquiry at the trial, and considerable latitude in the proof is always allowed.

As was said by Judge PARKER in *Hendrickson v. People* (10 N. Y. 31), "Just in proportion to the depravity of the mind, would a motive be trifling and insignificant which might prompt to the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of a human life."

It would be impossible for us to say that the entanglements in which the defendant became involved in consequence of his relations with the deceased, which were presented to his mind by the letters in question, might not have influenced his subsequent conduct in causing her death. At all events it was not, we think, legal error to allow the letters to go to the jury.

The letters were, it is true, simply the statements of the deceased, but they had been found in the defendant's possession, and, presumptively, their contents were known to him. They were just such letters as a wife would be expected to address to an absent husband. They conveyed to the defend-

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ant the idea that the deceased, at least, considered their relations permanent and practically that of husband and wife.

It cannot be denied that letters, or other statements of the deceased that came to the knowledge of the defendant, might, under certain circumstances, furnish a motive for the defendant's act. If, for instance, these letters disclosed to his mind the fact that the deceased was in possession of some dangerous secret concerning him which he was anxious should never be known, they would be admissible as furnishing a key to his conduct and a possible motive for putting her out of the way. They were admissible if they contained any threats or other statements that had any bearing on the question of motive. While it would be difficult for us to say that they do contain anything of that character, it must be borne in mind that the motives which prompt the mind to the commission of crime are frequently obscure, often trivial, and never adequate.

But suppose we assume that the letters contain nothing from which the jury could find or infer a motive for the homicide, how could they, in any proper or legal sense, have prejudiced the defendant? If they were mere harmless love letters, as they seem to be, they proved nothing that had not already been proven by the fact that the deceased left her husband for the defendant. The zeal of a prosecuting officer frequently projects into a criminal case some piece of evidence which is not strictly admissible, or is so near the border line as to become debatable. The exception in this case raises just such a question. But it is not every error that can be gleaned from the record of a trial that will warrant this court in reversing the judgment. The statute requires us to decide the case without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code, § 542.) The only disputed questions of fact in this case were the intent of the defendant, deliberation and premeditation. It is difficult, if not impossible, to conceive how these letters, if they contained nothing bearing on the question of motive, could possibly have prejudiced the defendant in the consideration of these questions. If they did not prove motive, or

tend to prove it, then the case for the People was as strong without as with them, since they proved nothing at all that had not already been established.

In the administration of criminal justice, this court, before disturbing a judgment for an erroneous ruling at the trial, should be able to see that the ruling tended, in some way, to prejudice the rights of the defendant. Any other rule would render the statute to which I have referred a dead letter.

Assuming that the letters proved nothing for the People, they proved nothing against the defendant. If we cannot see that they tended legitimately to prejudice the defendant, we ought not to imagine or speculate upon the possibility that the jury may have given them some weight to which they were not entitled. This would render every possible error in a prolonged trial a ground for granting a new trial.

The contention of the learned counsel for the defendant is that letters of the deceased, sent to the defendant and found in his possession, are, as matter of law, incompetent evidence under all circumstances. That proposition is not, we think, correct. It depends upon the contents of the letters and the nature of the information which they convey to the mind of the accused; and if the letters in question contain nothing bearing on the question of motive, they were harmless and of no account unless they contain some matter on other subjects calculated to prejudice the defendant. We are unable to find anything in them that could have the slightest tendency in that direction before any fair jury. When they were offered at the trial, the defendant's counsel pointed out nothing in them that was objectionable on this ground, and, without calling our attention now to anything of that character, he contents himself with the point that they were inadmissible because they were only statements of the deceased. Under these circumstances it is not the duty of this court to hold that the letters were hurtful to the defendant's case on some imaginary ground, even if they were not strictly competent. It is impossible to say with any reason that the result of the trial could have been different if the letters had not been intro-

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duced at all. If they had been excluded by the court as immaterial, the case against the defendant would have remained the same, and there is not the slightest ground for the belief that the jury could or would have rendered any other verdict.

On the whole, we think that the defendant has had a fair trial; that the evidence was entirely sufficient to warrant the verdict; that no errors of law were committed upon the trial to his prejudice, and that the judgment must be affirmed.

All concur, except BARTLETT and MARTIN, JJ., who dissent on the ground that the letters from the deceased to the defendant were inadmissible and prejudicial.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM J. KOERNER, Appellant.

1. EVIDENCE—NON-EXPERT TESTIMONY. The objection that the witness has not been shown to be an expert does not lie against a question which does not call for the opinion of an expert, but which relates merely to facts within the knowledge of the witness.

2. MURDER—DEFECT OF REASON—EXPERT TESTIMONY. On a trial for murder, where defect of reason at the time of the act is interposed as a defense, witnesses for the prosecution, who examined the defendant on behalf of the public immediately after the homicide, when he was apparently unconscious, may testify that in their opinion he was "shamming" or "faking," when they qualify as medical experts and state the grounds of their opinions.

3. DISCLOSURE BY PHYSICIAN—CODE CIV. PRO. § 834. Where the testimony of a physician is sought to be excluded under section 834 of the Code of Civil Procedure, the burden is upon the party seeking to exclude it to bring the case within the provisions of the section. He must make it appear not only that the information he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act.

4. CRIMINAL TRIAL—STRIKING OUT TESTIMONY—APPEAL. Where, on a criminal trial, the whole testimony of a witness called by the prosecution was stricken out by the court, and the greater part of the testimony was objected to by the defendant, and the record discloses no objection to its being stricken out, it must be assumed that the defendant consented;

154	355
154	602

154	355
155	371

154	355
160	487

154	355
164	457

154	355
166	52

j166	581
j166	582

154	355
171	*111

171	*112
171	*204

i171	*207
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154	355
172	*283

172	*243
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and, consequently, if any error was committed in its admission or in striking it out, and directing the jury to disregard it, the defendant is not in a position to avail himself of it on appeal.

5. CAPITAL CASE — STRIKING OUT TESTIMONY — APPEAL. The striking out by the trial court of the whole testimony of a witness called by the prosecution, does not furnish a ground for the reversal of a judgment of death, when it is obvious that the substantial rights of the defendant could not have been affected by eliminating that testimony from the case and directing the jury to disregard it.

6. INSANITY — NON-EXPERT TESTIMONY. Upon a question of sanity or insanity, lay witnesses may be examined as to acts and conduct of the party, and upon giving such evidence they may be permitted to testify whether such acts or conduct impressed them as rational or irrational.

7. CRIMINAL TRIAL — ORDER OF PROOF — DISCRETION OF COURT. Upon the trial of a criminal action it is in the discretion of the court to permit the prosecution to give evidence in aid of its original case, after the defense has rested; and a judgment will not be disturbed on appeal, on account of the granting of such permission, when the record discloses no abuse of discretion.

8. ORDER OF PROOF — CODE CR. PRO. § 388. Section 388 of the Code of Criminal Procedure, regulating the order of proceedings in trials, does not deprive the court of power to permit the prosecution to give evidence in aid of its original case after the defense has rested, without its being affirmatively shown that there is some good reason, in the furtherance of justice, why the evidence should be admitted at that time.

9. CAPITAL CASE — SELF-CONTRADICTORY EVIDENCE — APPEAL. The fact that evidence given by a witness for the prosecution in a capital case was contradictory of that previously given by him and was improbable, does not warrant the Court of Appeals in reversing the judgment upon the ground that the evidence was not entitled to credit, where the credibility of the witness and the effect to be given to his evidence were clearly for the jury to determine, and the trial court, at the defendant's request, charged that if any of the witnesses had willfully testified falsely, the jury had a right to disregard such testimony even though it was not contradicted or impeached, and it is apparent that the verdict was not dependent upon that evidence.

10. PROOF OF INSANITY. There is no authority or principle of the law of evidence which will admit proof of insanity or other disease by mere reputation in the family.

11. INSANITY AS A DEFENSE — CHARGE TO JURY. When all supposed errors in the principal charge to the jury, upon the defense of insanity, have been eliminated from the case by the court in charging as requested by the defendant, and the jury was instructed in a manner which prevented any misapprehension by it as to the law controlling the question, exceptions to those portions of the principal charge will not avail on appeal.

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12. **STATEMENT BY ANOTHER IN PRESENCE OF PARTY — ADMISSION BY ACQUIESCENCE — SILENCE.** A party's acquiescence in the statement of another, made in his presence, to have the effect of an admission must exhibit some act of voluntary demeanor or conduct; it must plainly appear that such statement was fully known and understood by the party before any inference can be drawn from his passiveness or silence, and the circumstances must not only be such as afforded him an opportunity to act or speak, but also such as would properly or naturally call for some action or reply from men similarly situated.

18. **STATEMENT MADE IN PRESENCE OF APPARENTLY UNCONSCIOUS DEFENDANT — ERRONEOUS ADMISSION IN EVIDENCE — REVERSIBLE ERROR.** On a trial for murder, in which defect of reason at the time of the act was interposed as a defense, a witness for the prosecution, who had testified as a medical expert that in his opinion the defendant was "shamming," when apparently unconscious, immediately after the homicide, was permitted to testify, over the defendant's objection, that he stated to a police officer, in the presence of the defendant and while the latter was apparently unconscious, that he "didn't see there was very much the matter with the man; that he was probably faking." *Held*, that the evidence was incompetent and improper, being mere hearsay, or the statement of the witness to a third party, unless made under such circumstances as to be binding upon the defendant; that the silence of the defendant, under the circumstances, did not raise a presumption of acquiescence in the witness's remark so as to render it competent as an admission; and that the ruling admitting the statement in evidence constituted a harmful error, calling for a reversal.

14. **COMPETENCY OF STATEMENTS IN PRESENCE OF DEFENDANT.** Statements in the presence of the defendant are only competent when he is in a position to hear and understand. If his condition as to consciousness is a matter of dispute, the statement in his presence is incompetent, although the People are entitled to go to the jury on the question whether the defendant was really unconscious or merely shamming.

(Argued October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Court of General Sessions of the city and county of New York, entered March 1, 1897, upon the verdict of a jury convicting the defendant of the crime of murder in the first degree and from an order denying the defendant's motion for a new trial.

The facts, so far as material, are stated in the opinion.

Abraham Levy for appellant. The exceptions to the admissibility of the so-called expert evidence of Mr. Brown,

Drs. Harrison and Donovan were well taken. (*Gregory v. Fichter*, 27 Abb. [N. C.] 90; *Nickerson v. Ruger*, 76 N. Y. 279; *Nelson v. S. M. Ins. Co.*, 71 N. Y. 453; *Carter v. Boehm*, 1 Smith's L. C. 286; *A. O. Co. v. Gilson*, 63 Penn. St. 146; *Hughes v. G. M. L. Ins. Co.*, 66 Barb. 462; *Heald v. Thing*, 45 Me. 394; *Lawson on Expert Evid.* 197; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424; *Roberts v. N. Y. El. R. R. Co.*, 128 N. Y. 455; *People v. McElvaine*, 121 N. Y. 250.) The court erred in admitting the evidence of Dr. Ward, the prison physician in actual professional attendance upon the defendant, and the error in striking out such evidence so erroneously admitted after it remained on record and before the jury, from the afternoon session on the 18th day of February, 1897, to the 23d day of February, 1897, was not cured by the court directing the jury to disregard such evidence so admitted. (Code Civ. Pro. § 834; Code Crim. Pro. § 392; *People v. Murphy*, 101 N. Y. 126; *People v. Schuyler*, 106 N. Y. 298; *Erben v. Lorillard*, 19 N. Y. 299; *Penfield v. Carpenter*, 13 Johns. 350; *Gillet v. Mead*, 7 Wend. 193; *Dresser v. Ainsworth*, 9 Barb. 619; *Allen v. James*, 7 Daly, 13; *Gurfield v. Kirk*, 65 Barb. 464; *Wersebe v. Broadway & S. A. R. R. Co.*, 1 Misc. Rep. 472; *Baird v. Gillett*, 47 N. Y. 186; *Anderson v. R., W. & O. R. R. Co.*, 54 N. Y. 334.) The admission of the evidence of Mrs. Clay and John E. Blaisdell was improper and was not competent evidence in rebuttal. Code Crim. Pro. § 388; *Marshall v. Davies*, 78 N. Y. 414; *Commonwealth v. Carey*, 2 Brewster, 404; *Ree v. Stimpson*, 2 C. & P. 414; *Jackson v. State*, 64 Ga. 344; *Rice on Evid.* § 218.) The court erred in permitting Dr. Harrison to state the conversation had with the police officer, in the presence of the defendant while he was unconscious, and in which conversation defendant was charged with "faking." (*Best on Evid.* §§ 111, 112; *People v. Green*, 1 Park. Cr. Rep. 17; *Comm. v. Cole*, 21 Pick. 515; 1 Greenl. on Evid. § 110; *Bob v. State*, 32 Ala. 560; *People v. McCrue*, 32 Cal. 98; *State v. Reed*, 62 Me. 129; 2 Green's Crim. Rep. 468; *Comm. v. Har-*

vey, 1 Gray, 487; *State v. Diskin*, 34 La. Ann. 919; *Comm. v. McDermott*, 123 Mass. 120; *Comm. v. Kenny*, 12 Mete. 235; *Comm. v. Walker*, 13 Allen, 570; *State v. Perkins*, 3 Hawks, 377.) The evidence given by Officer Fowler being contradictory to what he testified previously, and being inherently improbable, particularly as to an admission claimed to have been made to him by defendant, should have been wholly disregarded by the jury. (*Malloy v. N. Y. C. & H. R. R. Co.*, 10 Daly, 453; *Kehr v. Stauff*, 12 Daly, 115; *O'Brien v. McManus*, 13 Daly, 37; *In re Pool*, 8 Misc. Rep. 284; *Curtis v. W. & W. M. Co.*, 40 N. Y. S. R. 724; *T. M. Co. v. Foster*, 51 Barb. 346; *Lynch v. Pine*, 52 How. Pr. 435; 11 J. & S. 13; *Boyd v. Colt*, 20 How. Pr. 384; *Kelso v. State*, 47 Ala. 573.) It was error to strike out the evidence touching the insanity of Julia Barth the grandaunt of defendant, and of her incarceration in the insane asylum of the West Penn. Hospital. (*Walsh v. People*, 88 N. Y. 458; *People v. Wood*, 126 N. Y. 249; *People v. Garbutt*, 17 Mich. 9; *Reg. v. Tucker*, 1 Cox Cr. Cas. 103; *State v. Christmas*, 6 Jones L. R. 471, 475; *Baxter v. Abbott*, 7 Gray, 71; *Comm. v. Rogers*, 7 Mete. 500; *Reed v. State*, 16 Ark. 504; 3 Rice on Evid. 666; *Webb v. Richardson*, 46 Vt. 465; *Dajarnette v. Commonwealth*, 75 Va. 867.)

John D. Lindsay for respondent. The verdict of the jury was amply supported by the evidence, and there is no ground for any claim that the facts did not justify their finding. (*People v. Hoch*, 150 N. Y. 291; *People v. Cignarale*, 110 N. Y. 26; *People v. Kerrigan*, 147 N. Y. 210; *People v. Youngs*, 151 N. Y. 210; *People v. Sliney*, 137 N. Y. 570.) The trial judge did not err in allowing the prosecution to prove Dr. Harrison's declaration, in the presence of the defendant, concerning the latter's condition as he lay on the sidewalk in front of the drug store after the shooting. (*People v. Hughes*, 137 N. Y. 29; *People v. Taylor*, 138 N. Y. 398.) The trial judge properly permitted Dr. Harrison to give his opinion as

an expert regarding the defendant's condition at the time he examined him. (Code Crim. Pro. §§ 410, 419; *People v. Tuczkewitz*, 149 N. Y. 240; *People v. Zucker*, 20 App. Div. 363.) There were no errors in any of the rulings of the trial judge during the examination of the witness Donovan. (*People v. Youngs*, 151 N. Y. 219.) The whole of the witness Ward's testimony having been stricken out, and the jury instructed to pay no attention to it and to remove from their minds any impression it may have made, the exceptions based upon the rulings of the learned trial judge originally admitting his evidence raise no question for appellate review. (*People v. Wilson*, 141 N. Y. 185; *People v. Schooley*, 149 N. Y. 99; *People v. Hoch*, 150 N. Y. 291; Code Civ. Pro. §§ 84, 388.) The trial judge did not err in allowing the district attorney to introduce the evidence of the witness Mary J. Clay after the presentation of the defense. (Code Civ. Pro. § 388; *Leighton v. People*, 88 N. Y. 117; *U. S. v. Bennett*, 17 Blatchf. 357; *State v. Magoon*, 50 Vt. 333; *McMurphy v. Harvey*, 58 Vt. 549.) There were no errors in any of the proceedings upon the trial affecting any substantial right of the defendant. (*People v. Hoch*, 150 N. Y. 291.)

MARTIN, J. In October, 1896, the defendant was indicted for the crime of murder in the first degree. He was charged with having willfully, feloniously and with malice aforethought killed Rose A. Redgate. The action was brought to trial at the February term of the New York Court of General Sessions in 1897, and evidence was given showing that on the afternoon of the twenty-third day of September, 1896, the decedent was shot by a pistol in the hands of the defendant, which resulted in her death upon the same day.

The shooting took place on Seventh avenue between Thirteenth and Fourteenth streets in the city of New York. That the decedent was shot by a pistol in the hands of the defendant is not denied. But he insists: *First*, that the shooting was accidental; that his purpose was to commit suicide, which he attempted by placing the pistol to his head, when to pre-

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vent it the decedent grasped the pistol and it was accidentally discharged, causing the injury which resulted in her death; and, *second*, that when the homicide occurred he was laboring under such a defect of reason as not to know the nature and quality of his act, or that it was wrong.

On the trial evidence was introduced upon the part of the prosecution tending to show that the defendant, with premeditation and deliberation, willfully and intentionally shot and killed the decedent; that he shot her three times, and that two of the wounds inflicted were of a fatal character; that the relations which had previously existed between the defendant and decedent were of an affectionate nature; that the defendant had solicited her hand in marriage and an engagement had existed between them; that her parents were opposed to her marrying him upon the grounds of his former dissipation and generally bad habits; that a difficulty, or at least a disagreement, had arisen between the defendant and her father by reason of such opposition, and that the defendant, in substance, told him if he did not marry the decedent no one else should. Without attempting to state the evidence in detail, it may be said generally that it tended to establish the defendant's guilt of the crime charged, and was sufficient to justify the court in submitting that question to the jury and to uphold its verdict.

The evidence introduced on the part of the defendant as to the manner in which the homicide occurred was perhaps sufficient to have justified the jury in finding that he did not intend to kill the decedent. The proof as to just what occurred at the time was not very definite or clear. Still, the fact that the pistol was in the defendant's hands, and in his alone, coupled with the fact that there were three shots fired from the defendant towards the decedent, tended to show that he intentionally shot and killed her.

Upon the issue of the defendant's irresponsibility a great amount of evidence was given. That of the witnesses called on his behalf tended to show that several members of his family, on the side of his father and of his mother as well,

had been insane, that he was seriously injured when a boy, that he had scarlet fever and was subject to fits, which rendered him unconscious during their continuance, and that his acts for years previous to the homicide had, at times, been of an irrational character, and such as to indicate that, at those times, he was laboring under a defect of reason. On the other hand, evidence was introduced by the People to show that no such defect of reason existed at the time of the tragedy, and that the defendant was responsible for his act. It must, however, be admitted that the evidence was such as to involve the question of his responsibility in some doubt. But in view of all the evidence, it was clearly a question of fact to be determined by the jury.

The defendant, however, contends that as the question of his mental capacity was involved in uncertainty and one upon which there was a sharp conflict in the evidence, the various rulings of the court should be carefully examined, and if any errors were committed a new trial should be granted upon the ground that the question was doubtful, and, hence, it cannot be said that any improper evidence received, or proper evidence rejected, could not by any possibility have been harmful to him. To some extent, at least, this contention is correct. Therefore, it becomes necessary to examine the various exceptions of the defendant, and determine whether any of them were valid, and, if so, whether they can be said to have been harmless, and, consequently, should be disregarded.

The first exceptions to which attention is called in the brief of the learned counsel for the defendant relate to the admissibility of the evidence of the witnesses Brown, Harrison and Donovan.

His first contention is, that the court erred in admitting the evidence of the witness Brown as to the treatment of the defendant while in the hospital on the day of the homicide. The witness was first asked: "Did you give quinine for chills? During the seven years you have been there in the Tombs do you know whether or not you gave quinine for chills?" This was objected to. The court then asked the

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defendant's counsel if he desired to examine the witness to ascertain if he was enough of an expert to answer the question. He replied in the negative, and the court then overruled the objection. The defendant's counsel then stated his objections to the question, which were that the evidence was immaterial, irrelevant and incompetent, and that the witness had not been shown to be an expert and was not qualified to state. The question was then repeated, and the answer was that, as a rule, it was done, and that in the defendant's case it was kept up for three days. He also testified that during that time they gave him whisky as well as quinine. That this evidence was admissible, if the witness was qualified, is hardly denied. It may be conceded that the rule is that before a witness may be examined as an expert he must be shown to be qualified, and still this ruling be upheld. These questions, when examined, disclose that they did not call for any opinion of the witness as an expert, but simply for what was done upon that occasion, and incidentally for the usual practice in that hospital. When thus understood, we think it clear that the court committed no error in admitting this proof. The question was not one calling for the opinion of an expert, but related merely to facts which were within his knowledge.

The next question is in regard to the evidence of Dr. Donovan. He was asked whether, when he saw him on the day or evening after the homicide, the defendant was simulating a fit. This evidence was objected to on the ground that it was immaterial, irrelevant and incompetent, and that the competency of the witness as an expert had not been established. The court then stated to the counsel for the defendant that, if he desired, he might examine the witness to ascertain whether or not he was a qualified expert. That right was, however, reserved until the cross-examination of the witness. He was then permitted to answer the question, and testified that he thought he was "shamming." He also testified that he was a graduate of the Bellevue Hospital Medical College; that he was graduated in March, 1886; that since that time he had practiced medicine, and that he was a regularly

licensed physician. He then stated the grounds upon which his answer was based, which, among others, were that the defendant's respiration and pulse were normal; that everything about him appeared to be normal, and the witness gave his reasons in full for believing that the defendant was "shamming," and had no fit at the time. We think this evidence was clearly admissible, and that the court committed no error in its ruling upon that subject.

The next and last question under the exceptions to which we have referred arises as to the admission of the evidence of Dr. Harrison. He was a witness for the prosecution and was asked whether, in his opinion, the defendant was "faking." This was objected to as immaterial, irrelevant and incompetent, and also upon the ground that there had been no proper foundation laid. The objection was sustained. The witness then testified that he made an examination of the defendant, and was able to form an opinion as to his condition. He was then asked what his condition was, which was objected to by the defendant as immaterial, irrelevant and incompetent, and that no proper foundation had been laid. The court then asked the defendant's counsel if he desired to cross-examine the witness in relation to his qualifications as an expert, and he was cross-examined. He testified that he graduated from a medical school in 1895; that he was licensed to practice, had graduated as a doctor of medicine, had seen persons in epileptic fits, while under epileptic spasms, and while under epileptic aura. Thereupon the court overruled the objections, and the witness testified that the man's condition presented nothing abnormal, except his apparent unconsciousness; that his pulse was normal, his respiration was normal, that the pupils of his eyes were normal, that his color was normal, and that in his opinion he was shamming unconsciousness. We think this evidence was plainly admissible.

On the trial Dr. Ward was sworn as a witness for the prosecution. He was the physician in attendance upon the defendant while in the Tombs, had treated and prescribed for him, and had occupied that relation up to the day before his evi-

dence was given. He testified that after the conclusion of that relation he saw the defendant, asked him how he was getting along with his trial and other similar questions; that he then said to him he had a letter, asked him to look at the envelope and open and read it, and told him that he wanted to ask him something about it; that the defendant took the letter, appeared to read it twice, when the doctor asked him who wrote it, and he replied "Rosa Redgate;" that he asked the defendant if the contents of the letter were true, to which he replied, "Yes, she wouldn't write anything that is not true, but she must have been influenced to write that by some of my enemies." This witness was also permitted to testify that while in court the defendant appeared to be in a sort of "dopy" condition, while in the Tombs he seemed to be bright and comprehend everything around there, and looked bright and all right. This evidence was objected to by the defendant; the objection was overruled and he duly excepted. He now contends that that evidence was prohibited by section 834 of the Code of Civil Procedure. That section provides: "A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The testimony of this witness was to the effect that his knowledge of the facts to which he testified was not acquired while attending the defendant in his professional capacity, and, besides, that he told the defendant that he was not at that time acting as his physician. It becomes quite manifest from an examination of the record that the knowledge of the witness of the matters to which his testimony related was not acquired while attending the defendant in a professional capacity, that it was not necessary to enable him to act in that capacity, and that the defendant well understood that he was not talking with him as a physician, but as an individual only. The most important part of the evidence of this witness related to a letter written by the decedent, which was read by the defendant, and to his statements in regard to it. We are of

the opinion that this evidence was properly admitted, and that the defendant's exceptions were invalid. (*People v. Schuyler*, 106 N. Y. 298; *People v. Hoch*, 150 N. Y. 291, 303.) Where the testimony of a physician is sought to be excluded under the provisions of that section of the Code, the burden is upon the party seeking to exclude it to bring the case within its provisions. He must make it appear not only that the information which he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act. (*Edlington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *People v. Schuyler*, *supra*; *Fisher v. Fisher*, 129 N. Y. 654.)

Near the close of the evidence, however, and when the prosecution rested for a second time, the court said: "I desire to strike from the minutes, or from the record, the whole of the testimony given by Dr. Ward, and I desire to instruct the jury that, in the consideration of this case they are to pay no attention to the testimony given by Dr. Ward; and I ask you, gentlemen, to remove from your mind any impression his testimony may have made. Now, Mr. Levy, I presume, will make his formal motion. Mr. Levy: I think I had better defer that until I see whether there will be anything in the way of sur-rebuttal testimony. The Court: We will wait for you then. You may consider it a few minutes." The defendant then rested. Whether we are to regard this as a positive act by the court striking out the evidence, or whether it was a suggestion to the defendant's counsel that upon a formal motion it would be stricken out, is not quite clear. But, as the defendant contends that the evidence was stricken out, we shall assume that to be the case and dispose of the question accordingly. We find in the record no objection or exception to the action of the court in that respect. As the greater portion of the evidence was objected to by the defendant, and as the record discloses no objection to its being stricken out, we think it must be assumed that the defendant consented, and, consequently, if any error was committed in its admission,

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or in striking it out and directing the jury to disregard it, the defendant is not in a position to avail himself of it. (*People v. Wilson*, 141 N. Y. 185, 189; *People v. Schooley*, 149 N. Y. 99, 103.) Moreover, we think it is quite obvious that the substantial rights of the defendant could not have been affected by eliminating that testimony from the case and directing the jury to disregard it.

The next rulings criticised are those of admitting an affidavit made by the defendant on the seventh day of November, 1895, which was in substance an information against a bartender for selling strong and spirituous liquors on the fifth day of that month, and in admitting his testimony given as a witness upon three separate trials which took place between the eleventh of December of the same year and the thirteenth of July, 1896. This evidence was admitted for the express purpose of proving the acts of the defendant to rebut the evidence relied upon by him to show that he was irrational when the homicide occurred. After that proof had been admitted, the witness House was permitted to testify that the testimony and acts of the defendant on those occasions impressed him as rational. It is an established rule of evidence in this state that, upon a question of sanity or insanity, lay witnesses may be examined as to the acts and conduct of the party, and that upon giving such evidence they may be permitted to testify whether such acts or conduct impressed them as rational or irrational. We think this evidence was within the rule thus established. The testimony to the effect that the defendant was engaged in procuring the enforcement of the Excise Law, that he made complaints, was examined as a witness, and his acts in connection therewith, were some evidence bearing upon the question of his mental integrity, and if they impressed the witness observing them as rational, the prosecution was entitled to the benefit of that proof, and we think the court properly admitted it.

On the trial, after the defendant had rested, the prosecution was permitted to introduce the evidence of two witnesses as to the transaction which resulted in the death of the deceased.

It must be conceded that the evidence might more properly have been produced by the prosecution and made a part of its evidence in chief. The contention of the appellant is that the court had no right to admit this evidence after the defendant had rested, and that it constituted an error for which the judgment should be reversed. As sustaining that contention he relies upon section 388 of the Code of Criminal Procedure. That section provides: "The jury having been impaneled and sworn, the trial must proceed in the following order: 1. The district attorney, or other counsel for the people, must open the case, and offer the evidence in support of the indictment; 2. The defendant or his counsel may then open his defense, and offer his evidence in support thereof; 3. The parties may then, respectively, offer rebutting testimony, but the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case." The appellant argues that, as a matter of law, the prosecution had no right to introduce this evidence, and that the court possessed no authority to admit it, unless it was affirmatively shown that there was some good reason, in the furtherance of justice, why the evidence should have been admitted at that time. The provisions of section 388 are a mere formulation of the rules which previously existed in regard to the order of proof in civil and criminal cases. But it has always been regarded as within the discretion of the court to vary those rules. That in this case the learned judge was authorized to exercise his discretion upon the question whether the evidence of these witnesses should be admitted at that stage of the trial, there is no doubt, and unless his discretion was abused it constitutes no error. (*Leighton v. People*, 88 N. Y. 117.) In the case cited it was held that upon the trial of a criminal action it is in the discretion of the court to allow the prosecution to give evidence in aid of the case already made, after the defense has rested, although the evidence is in contradiction of matter sworn to by the prisoner. While it may be properly said that if the testimony of those witnesses was known and understood by the district attorney when he rested he should have called

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them as witnesses before that time, yet it was discretionary with the court to permit their testimony afterwards, and we find nothing in the record sufficient to justify this court in holding that there was an abuse of that discretion. Consequently, the judgment should not be disturbed on account of that ruling.

The next ground upon which the defendant claims that the judgment should be reversed is that, as the evidence given by the witness Fowler was contradictory of that previously given by him and was improbable, it should have been disregarded by the jury, and, therefore, this court should reverse the judgment and grant a new trial. The credibility of this witness and the effect which was to be given to his evidence were clearly for the jury to determine. This principle seems to have been recognized by the defendant, as, at his request, the court expressly charged that if any of the witnesses had willfully testified falsely, the jury had a right to disregard such testimony even though it was not contradicted or impeached. Moreover, how much effect may have been given to that evidence is in no way disclosed. It may have been entirely disregarded, and still the jury have found the defendant guilty of the crime charged. As the verdict was not dependent upon that evidence alone, it is not within the province of this court to reverse the judgment upon the ground that it was not entitled to credit.

The next ground of error alleged is that the court erred in striking out the evidence touching the insanity of Julia Barth and her incarceration in an insane asylum. The defendant's father was called as a witness and testified, without objection, that Mrs. Barth, a great aunt of the defendant, was insane, confined in the West Penn. Hospital as an insane person for the period of six months in 1872, and that she was at the time of the trial being cared for at home by her daughter. Upon cross-examination it appeared that the only knowledge the witness had of the subject he received from information given him by her children and husband. The court, upon ascertaining that the witness had no personal knowledge of the facts

as to which he testified, struck out his testimony upon the ground that it was not the best evidence, but mere hearsay, and the defendant duly excepted.

The appellant now contends that the fact that Mrs. Barth was insane could be properly proved by showing that it was a matter of common reputation in her family, and invokes the rule which is sometimes applied when a question of pedigree is involved. We think that rule has no application here. While the term "pedigree" as usually employed in the rule of evidence relating to that subject embraces birth, marriage and death, and the times when these events occur, still even in those cases the rule relating to the admission of hearsay evidence is restricted to the declarations of *deceased persons* who are related by blood or marriage to the person, and, therefore, interested in the question. But it is to be observed that this rule applies only to the declarations of deceased persons, and is based principally upon the fact that it is the best evidence that can be then obtained, and if not admitted the facts could not, by any possibility, be established. No such condition existed here. Mrs. Barth was still living, as were the persons who informed the witness of the matters to which his testimony related. It is obvious, therefore, that this evidence was inadmissible, as it was not the best evidence and could not be established by mere reputation. Moreover, we are not aware of any authority or principle of the law of evidence that would admit proof of insanity or other disease by mere reputation in the family. We are of the opinion that this evidence was improper, and that the court was justified in striking it from the record.

Another ground upon which the defendant seeks a reversal is based upon alleged errors in the charge of the trial judge. The portion of the charge to which he claims to have excepted, and which he now contends was erroneous, was as follows: "The defendant interposes the defense of insanity for the purpose of relieving himself from the position which he now occupies. He does not claim that he is now insane, but he does claim that at the time he committed the homicide he was

insane. This is an affirmative defense, and one which the law requires should be established by evidence satisfactory to the jury. * * * Another provision of the statute is that a person is presumed to be responsible for his acts, and the burden of proof is upon the accused person, except as otherwise prescribed; so that we start in this case with a presumption that the defendant, at the time he perpetrated the act which resulted in the death of the woman, was legally responsible for his acts, and the burden of establishing his irresponsibility rests upon him to a certain extent."

The portions of the charge quoted are but a small part of the instructions of the court to the jury. While it may be that, if taken alone, they might be construed as incorrectly stating the law in regard to the burden of proof where the defense is insanity, still, when taken in connection with the whole charge, we think the jury was correctly instructed upon that question. Moreover, after the court had finished its principal charge, and the defendant, as he claims, had excepted to the portions already referred to, he made numerous requests, among which were the following: "I ask your honor to charge the jury that, upon the trial for murder, where the defense interposed is the insanity of the defendant, he is entitled to the benefit of every reasonable doubt resting upon the question of his sanity; that, upon the trial for murder, where the defense interposed is the insanity of the defendant, the People must establish the sanity of the defendant beyond a reasonable doubt; that, if the jury cannot say, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the act, and cannot say whether, at that time, he was sane or insane, the defendant must be acquitted; that the defense of insanity need not be proven beyond a reasonable doubt; that the jury, in considering this case, are bound to act upon the presumption that the accused — the defendant — is innocent, and should endeavor, if possible, to reconcile all the circumstances of the case with that of innocence; that the burden of proof rests with the People in this case from the beginning to the end of the trial, and the People are bound to prove that the

defendant committed the crime charged in the indictment, and that, at the time of its commission, he was in such a condition of mind as to be responsible for his acts, and all of which must be proved beyond a reasonable doubt, and if this is not so proved the defendant is entitled to be acquitted; that the jury must be satisfied beyond a reasonable doubt, from the evidence of the case, of the sanity of the defendant at the time of the commission of the act charged in the indictment, and if the People fail to establish the sanity of the defendant at the time of the commission of the act charged in the indictment, he cannot be convicted of any crime, and is entitled to an acquittal; that the People must satisfy the jury beyond all reasonable doubt, that, at the moment the act alleged in the indictment was committed by the prisoner, the defendant had reason, perception and understanding sufficient to enable him to discern right from wrong, and that, if he had not, it is the duty of the jury to acquit him; and that it is the duty of the People to satisfy the jury beyond all reasonable doubt that, at the moment the act alleged in the indictment was committed by the prisoner, he had reason, perception and understanding sufficient to enable him to discern right from wrong, with respect to that particular act, and, if he did not, the jury must acquit; that, if the jury entertain a reasonable doubt from the evidence of the case, as to the sanity or insanity of the defendant at the time of the commission of the act charged in the indictment, he is entitled to the benefit of that doubt and must be acquitted; that, if the jury believe that the defendant did not suffer from any mental aberration which would absolve him from punishment for the act charged in the indictment prior to the commission of the act, or subsequent thereto, but that such state of mental aberration did exist at the moment when the act occurred which the defendant stands charged with, he cannot be convicted of the crime charged in the indictment, or any other crime, and must be acquitted." All these requests were charged by the learned trial judge.

While we are of the opinion that the court in its principal

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charge, when read together, correctly stated the principles of law which relate to the defense of insanity, yet, when we consider the defendant's requests which were charged by the court, it becomes a certainty that the jury was correctly instructed as to the law. Any supposed error contained in the principal charge was completely eliminated from the case by the court in charging as requested by the defendant, and the jury was instructed in a manner which prevented any misapprehension by it as to the law controlling that question. Therefore, we find nothing in the exceptions to the charge which would justify us in disturbing the judgment in this case.

The only remaining ground upon which the defendant insists that a new trial should be granted, is the error of the court in permitting Dr. Harrison to testify to a conversation he had with the police officer in the presence of the defendant while he was apparently unconscious, in which he was charged with "shamming." This witness was called by the prosecution and asked what he (the defendant) was suffering from, if anything. To which he replied: "So far as I could tell he was not suffering from anything. I simply made a superficial examination, and found that he presented nothing abnormal, except that he was apparently unconscious." Then followed this question: "Did you have any conversation with anybody in his presence and hearing outside of that drug store?" He answered: "I did. Q. With whom? A. The officer. Q. What did you say to him?" This was objected to by the defendant upon the ground that it was immaterial, irrelevant and incompetent, and that it was not shown that he was in a condition or position to understand or hear what was said in his presence, and upon the further ground that it had not been shown that he was in a condition to understand or know or hear what was said. These objections were overruled, and the defendant excepted. The witness then testified that he said to the officer that he "didn't see there was very much the matter" with the man; that he was probably "faking," and that he might be taken to the precinct. That this evidence was incompetent and improper, being

mere hearsay, or the statement of the witness to a third person, unless made under such circumstances as to be binding upon the defendant, is quite manifest. The only ground upon which it is or can be properly claimed that this evidence was admissible is that the silence of the defendant amounted to an acquiescence in the statement made by the witness, and was, therefore, binding upon him. That, under some circumstances, admissions by a party may be implied from his acquiescence in the statement of others, is an established principle of the law of evidence. A party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct. When the claimed acquiescence is in the conduct or in the language of others, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. Moreover, the circumstances must not only be such as afforded him an opportunity to act or to speak, but also such as would properly or naturally call for some action or reply from men similarly situated. Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to ascertain what reply the party to be affected makes to them. If he is silent when he ought to have denied, the presumption of acquiescence arises. But it is clearly otherwise when his silence is of a character which does not justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner unable to understand the language employed, he cannot be prejudiced by statements made by others in his presence. Nor is such silence an assent, unless the statements were such as to properly call for a response.

The rule in regard to admissions inferred from acquiescence in the verbal statements of others is to be applied with careful discrimination. As was said by BEST, C. J., in *Child v. Grace* (2 C. & P. 193): "Really it is most dangerous evidence." It should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some

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assertion made to a party with respect to his rights, in which, by silence, he acquiesces. A distinction is recognized between declarations made by a party interested and those made by a stranger, it having been held that while what one party declares to the other without contradiction is admissible, what is said by a third person may not be. (Greenleaf on Evidence, §§ 197, 199; Wharton on Evidence, § 1136 *et seq.*; *Moore v. Smith*, 14 S. & R. 393; *Child v. Grace*, 2 C. & P. 193; *La Bau v. Vanderbilt*, 3 Redf. 384, 395; *Gibney v. Marchay*, 34 N. Y. 301, 305; *Lanergan v. People*, 39 N. Y. 39; *People v. Holfelder*, 5 N. Y. Crim. R. 179; *People v. Willett*, 92 N. Y. 29; *Talcott v. Harris*, 93 N. Y. 567; *Learned v. Tillotson*, 97 N. Y. 1; *Bank of B. N. A. v. Delafield*, 126 N. Y. 410, 418; *Thomas v. Gage*, 141 N. Y. 506.)

As witnesses were called who testified that in their opinion the defendant was "faking" or "shamming," the ruling may be upheld upon the ground that the court was justified in holding that the defendant must have understood what was said, if the statement was one naturally calling for some action or reply on his part.

A more serious difficulty, however, arises when we consider whether even if the defendant understood what the witness said, there was any presumption of acquiescence to be drawn from his silence. Were the circumstances such as not only afforded the defendant an opportunity to act or speak, but were they also such as would properly and naturally call for some action or reply from persons similarly situated? If not, then clearly the evidence was improper. The statement of the witness was to the effect that the defendant was feigning unconsciousness. Under the circumstances, was a reply to that statement naturally to be expected? If he was unconscious, none could have been made. If he was not, but was feigning unconsciousness, naturally neither he nor any other person similarly situated would have replied. It is impossible upon any theory to justify this ruling. We think it was error, and the only remaining question is whether it was such an error as to require a reversal.

This evidence, if believed, was important and weighed heavily against the defendant. It was introduced on the theory that it was a tacit admission upon his part that he was feigning unconsciousness. If the jury understood that he practically admitted he was not unconscious, but was simulating it, it bore with great force upon the question of premeditation and deliberation. It is not improbable that the jury may have so regarded it, and drawn inferences therefrom which were highly prejudicial to the defendant. But it is said that the fact that he was not unconscious was proved by the opinions of witnesses, and, consequently, this evidence is harmless. Possibly so. But this court cannot say that it was not relied upon by the jury as potent proof of the defendant's guilt. It may be it believed that he tacitly admitted he was feigning unconsciousness, and it was but a part of a premeditated plan which involved the homicide and his escape from punishment by that means, and, consequently, was prejudicial to him.

Dr. Harrison, as an expert, testified that in his opinion the defendant was feigning unconsciousness. In determining the weight to be given to this evidence, its credibility and competency were involved. In the absence of proof of his declaration to the officer, the jury might have believed that this testimony was induced by a desire to aid the prosecution, or was affected by a prejudice engendered by the defendant's claim that he was not a qualified expert. These views, if entertained, would have materially affected his credibility, and his evidence might have been disregarded. But proof that before his ability was questioned or his interest was enlisted, he had made a statement that was in keeping with his testimony, may have been regarded by the jury as a corroboration of his evidence. That this evidence may have had some effect upon the determination of the jury is not impossible.

The burden of showing that it was harmful is not upon the appellant. It rests with the respondent to show that it was harmless, and could by no possibility have prejudiced the defendant. (*Greene v. White*, 37 N. Y. 405, 407; *Stokes v.*

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People, 53 N. Y. 164, 183; *People v. Greenwall*, 108 N. Y. 296, 303.) In the *Greene* case, HUNT, J., said: "It is not for the defendant to show how or to what extent he was prejudiced. The existence of the error establishes his claim to relief. If the plaintiffs wish to sustain the verdict, it is for them to show that the error did not and could not have affected it." In the *Stokes* case, RAPALLO, J., said: "But it is claimed that the error may be overlooked on the ground that the prisoner was not prejudiced thereby, and cases are cited which decide that where it appears to the appellate court that error has been committed, yet that the error could not possibly have prejudiced the party complaining, it will not be made a ground of reversal either in civil or criminal cases. In all these cases it will be found that the court has been exceedingly careful so to limit this rule as to render it applicable only where by no possibility could the error have produced injury, and even this was an innovation upon ancient rules, under which it was a matter of course to reverse when error appeared, without inquiring into its materiality." (See, also, *People v. Corey*, 148 N. Y. 476, 494; *People v. Strait*, 154 N. Y. 165, 171.) Applying to this question the doctrine of the cases cited, it becomes obvious that this court cannot properly hold that the error in admitting that evidence was merely technical, and that it could by no possibility have been harmful to the defendant. In the language of Judge EARL: "A person on trial for his life is entitled to all the advantages which the laws give him, and among them is the right to have his case submitted to an impartial jury upon competent evidence." (*People v. Greenwall*, 108 N. Y. 296, 303.)

We cannot fail to observe the many needless questions that are presented to this court apparently through the overzeal of those acting in the capacity of public prosecutors, which might have been easily avoided by a more careful preparation and trial. In the hurry and confusion attending such a trial the court should not be expected to always correctly determine every embarrassing question that the ingenuity of opposing counsel can present. A public prosecutor is a public officer,

whose duty requires only that he shall fairly present to the court and jury the question involved in his case. When he goes beyond and by captious objection or ill-considered offer imposes upon the trial court unnecessary burdens, that an adverse result may ultimately follow may well be expected.

For the error already pointed out the judgment appealed from must be reversed and a new trial granted, judgment of reversal to be entered, certified and remitted pursuant to the provisions of sections 547 and 548 of the Code of Criminal Procedure.

BARTLETT, J. I agree with Judge MARTIN, and am also of opinion that for the following additional reasons there was reversible error in allowing Dr. Harrison to testify to a conversation he had with a police officer in the presence of the defendant when the latter was lying on the sidewalk, shortly after the shooting, and it was a disputed question of fact whether he was unconscious or shamming unconsciousness. This very important question was for the jury to determine. If they decided that the defendant was shamming, the fact so established bore with terrible force against him, and tended to show that he did know the quality of his act, and that it was wrong. It was a fact that tended to shatter the foundations upon which his principal defense rested.

It was, of course, competent for the People to put Dr. Harrison on the stand at the trial and prove by him, if they could, that defendant was shamming, in his opinion, on the occasion in question.

The defendant could then meet this evidence by such proofs as he might have, and the jury would take the question to their consultation room with the other issues in the case.

This was not the actual course of the trial. Dr. Harrison was not asked to give his opinion upon a disputed question of fact which was to be submitted to the jury. He was asked to state what he said to a police officer in the presence of the defendant immediately after the shooting, and defendant's counsel objected that "it is not shown that the defendant was

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in condition or position to understand or hear what was said in his presence."

Then followed this question by the court: "Q. Was it in the presence of defendant, doctor? A. Yes, sir. The Court: Then I will allow it."

What, then, was the situation? The court practically held that the defendant was conscious, and the evidence was competent, for it would shock the sense of justice if a defendant was to be prejudiced by his failure to reply to a statement made in his presence, if at the time, although physically present, he could not hear and understand.

The result of this ruling was that the court determined a disputed question of fact and took it from the jury.

There is only one safe rule in a case of this kind, and it is well settled by this court, viz.: Statements in the presence of the defendant are only competent when he is in a position to hear and understand. (*M'Kee v. People*, 36 N. Y. 113, 116; *Lanergun v. People*, 39 N. Y. 39, 41.)

If his condition is a matter of dispute, the statement in his presence is incompetent, although the People are entitled to go to the jury on the question whether defendant was really unconscious or merely shamming.

HAIGHT, J. (dissenting). I think the statement of Dr. Harrison to the effect that he did not see that there was very much the matter with the defendant and that he was probably faking, and the statement made by Dr. Donovan to Officer Fowler to "look out for him or he would get up and run," were, under the circumstances, improperly received and should have been excluded; but I am not satisfied that a new trial should be granted in consequence of the admission of these statements. Both Dr. Harrison and Dr. Donovan examined the defendant immediately after the homicide, and each was sworn as a witness upon the trial, in which they fully described his condition and gave it as their opinion that he was shamming unconsciousness. Dr. Donovan said that he made a thorough external examination as well as he could with

the man lying upon the sidewalk ; that he examined his head and body and felt of his pulse ; that his pulse rate was eighty and his respiration eighteen a minute ; that everything about him appeared to be normal ; that being of the impression that he had shot himself he had looked for hemorrhage and found none ; that he opened his lips and put his fingers in his mouth to find out if he had shot himself in the mouth, and when he did so, defendant attempted to close his mouth upon his fingers. Dr. Harrison testified that the man's condition presented nothing abnormal, except his apparent unconsciousness ; his pulse was normal, his respiration normal, the pupils of his eyes and color normal. The jury, therefore, had the benefit of the sworn testimony of the doctors, giving the details of the transaction and a full description of the condition of the defendant, with their reasons for their conclusions as to his condition. I am unable to see how, under the circumstances, an intelligent jury could have given weight to, or been improperly influenced by, the declarations. It is evident that the defendant did not regard them as seriously prejudicial to his case, for, when he had Policeman Coffey upon the stand, he showed by him that the ambulance surgeon, referring to Dr. Harrison, had told him that the defendant was shamming.

It is provided that, after hearing an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties. (Code Criminal Procedure, section 542.)

In this case the defendant shot and killed Rose Alice Redgate, in one of the streets of New York, at about six o'clock in the evening, in the presence of numerous witnesses ; this fact has not been denied. The evidence presented on behalf of the defendant was properly submitted to the jury ; and if there was ever a case in which the provisions of the Code referred to should be given force and effect, it appears to me that this is one. I am unwilling to join in the affirmance of a case of this character where the accused has not had the benefit of a fair and impartial trial ; but in cases where no reasonable doubt with reference to the guilt of the accused exists, I

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think we ought not to send a case back for errors which cannot and ought not to affect the result reached by the jury. If any public good is to be accomplished by the administration of the criminal law, punishment should follow the commission of crime with reasonable dispatch. The legislature has given this court broad powers with reference to the granting or refusing of new trials; and, whilst it is our duty to fully protect the rights of the accused and see to it that no innocent person is punished, we should not forget that there is a public interest involved, which it is also our duty to regard.

MARTIN and BARTLETT, JJ., read for reversal and new trial; ANDREWS, Ch. J., O'BRIEN and VANN, JJ., concur.

HAIGHT, J., reads for affirmance, and GRAY, J., concurs.

Judgment reversed and new trial granted.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL J. DADY, Appellant, v. THE SUPERVISOR OF THE TOWN OF GRAVESEND, Respondent.

1. TOWN OF GRAVESEND — ANNEXATION TO BROOKLYN — ISSUANCE OF BONDS FOR STREET IMPROVEMENTS. Chapter 639, Laws of 1895, creating a commission to determine claims, and providing for the issuance of bonds, for payment for public improvements in the late town of Gravesend, annexed to the city of Brooklyn by chapter 449, Laws of 1894, does not deprive the holder of a contract for constructing and grading a highway, executed by the town authorities before the annexation, in a proceeding pending and unfinished at the time of the passage of the act of annexation, of the right to have bonds in payment of work done by him issued by the supervisor of the town, under chapter 171, Laws of 1893, where he has not submitted his claim for determination under the act of 1895.

2. CONSTRUCTION OF NEPTUNE AVENUE — RESOLUTIONS OF BOARD OF SUPERVISORS — APPOINTMENT OF GRADING COMMISSIONERS FOR PORTION OF AVENUE. Land having been condemned and vested in the town of Gravesend, Kings county, for the purposes of a public highway, called Neptune avenue, between West Sixth street and old lot 47, by proceedings instituted in pursuance of a resolution of the board of supervisors under chapter 554, Laws of 1881, the board of supervisors, on June 13, 1892, provided by resolution for the grading of Neptune avenue between West Sixth street and old lot 47, but nothing was done thereunder, and on

December 12, 1892, a second resolution was passed providing for the closing of the avenue between West Sixth street and West Fifteenth street, for a change of the lines, and for the opening and grading thereof between those points. Before anything was done under this resolution, and on January 30, 1893, a resolution was passed amending and rescinding in part the resolution of June 13, 1892, so that it only provided for the construction and grading of the avenue between West Fifteenth street and old lot 47. Thereupon grading commissioners for Neptune avenue, between West Fifteenth street and old lot 47, were appointed by the town supervisor, by a certificate dated February 1, 1893, and on February 26, 1893, they made a contract for the construction and grading of the avenue between those points. *Held*, that the effect of the resolutions of December 12, 1892, and January 30, 1893, having been to so amend the resolution of June 13, 1892, as to limit the work of constructing and grading the avenue to the portion thereof between West Fifteenth street and old lot 47, it was lawful to appoint grading commissioners for that portion of the avenue.

3. CERTIFICATE OF APPOINTMENT OF GRADING COMMISSIONERS — CONTRACT FOR WORK. The certificate of appointment of the grading commissioners was dated February 1, 1893. The resolution of the board of supervisors of January 30, 1893, was not approved by the supervisor at large until February 2, 1893, and it was claimed that the certificate of appointment was, therefore, void. A resolution of the board of supervisors provided that grading commissioners, appointed by the supervisor of the town of Gravesend, should take an oath of office and file it with the town clerk. The grading commissioners in question took the oath of office on February 4, 1893, and filed it February 5, 1893. *Held*, that the appointment of the grading commissioners was not complete until the official oath was duly taken and filed; that as this was not done until after the resolution of January 30, 1893, had been approved by the supervisor at large, their appointment was lawful; and that the contract made by them was valid so far as affected by the regularity of that appointment.

4. MANDAMUS TO COMPEL ISSUANCE OF BONDS — PARTIES. On an application for a peremptory writ of mandamus to compel the supervisor of the town of Gravesend to issue bonds under chapter 171, Laws of 1893, in payment of work done by the relator under such contract for constructing and grading Neptune avenue, between West Fifteenth street and old lot 47, it was objected that there was a defect of parties, in that the town treasurer and clerk, who would have to join in executing the bonds, were not made parties. *Held*, that the objection was answered by the fact that the grading commissioners had refused the relator payment, for the alleged reason that the supervisor of the town had not raised the money in the manner provided by law; and it was fair to assume that if the courts should direct the supervisor to perform his duty, the other town officials would respect the decision and obey it.

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Points of counsel.

5. CONFIRMATION OF REPORT OF COMMISSIONERS OPENING HIGHWAY—COLLATERAL ATTACK. The contract under which the work was done for which the issuance of bonds was sought to be compelled by mandamus, was made in 1893. The report of the opening commissioners, opening the highway, was confirmed in 1888, and the confirmation had not been attacked until the present proceeding. *Held*, that the order of confirmation was in the nature of a judgment and could not be collaterally attacked at this time—none of the points urged against it being jurisdictional or such as to render the original proceeding laying out the avenue void.

People ex rel. Dady v. Supervisor, 6 App. Div. 225, reversed.

(Argued November 22, 1897; decided November 30, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 19, 1896, which reversed an order of Special Term granting to the relator a peremptory writ of mandamus.

The facts, so far as material, are stated in the opinion.

Charles F. Brown and *James C. Church* for appellant. Chapter 639 of the Laws of 1895 did not repeal chapter 171 of the Laws of 1893, nor was it intended as a substitute for it. Its manifest intention was to create a tribunal to whom parties having disputed claims against the town might submit their claims to arbitration. If susceptible of the interpretation granted to it by the Appellate Division, upon the appeal in this proceeding, it was unconstitutional, in that it impaired the obligation of contracts. (*People ex rel. v. Bennett*, 18 App. Div. 335; U. S. Const. art. 1, § 10; *Von Hoffman v. Quincy*, 4 Wall. 535; *Cooley on Const. Lim.* [6th ed.] 344; *Bronson v. Kuzia*, 1 How. [U. S.] 311; *McCracken v. Hayward*, 2 How. [U. S.] 608; *Boice v. Boice*, 27 Minn. 371.) The resolutions are to be treated as acts of the legislature. (*Hubbard v. Sadler*, 104 N. Y. 223.) The relator's motion papers were properly drafted. (*People v. Carpenter*, 24 N. Y. 86; *People ex rel. v. Bd. Suprs.*, 153 N. Y. 370; *People ex rel. v. Mayor, etc.*, 144 N. Y. 63; *In re Freel*, 148 N. Y. 166.) The grading commissioners were legally appointed and had authority to make the contract in question.

(*Carpenter v. People*, 64 N. Y. 483; *Lambert v. People*, 76 N. Y. 220; *In re Kendall*, 85 N. Y. 305.) The papers on the original motion, which have been submitted on this motion, do not in any way affect the rights of the relator. (*People ex rel. v. Flagg*, 46 N. Y. 401.) All of the questions raised by the respondent with regard to the regularity of the proceedings were questions which could have been raised in opposition to the motion to confirm the report of the grading commissioners; the failure to do so makes it a judgment which cannot be now attacked. (*In re Dept. of Parks*, 73 N. Y. 560; *In re Arnold*, 60 N. Y. 26; *In re U. E. R. Co.*, 112 N. Y. 61; *Dolan v. Mayor, etc.*, 62 N. Y. 472; *Meth. Church v. Mayor, etc.*, 55 How. Pr. 57.)

Joseph A. Burr for respondent. The papers of relator are entirely insufficient, if uncontradicted, to authorize the granting of the writ. (High on Ex. Leg. Rem. [3d ed.] § 450; *People ex rel. v. Mayor, etc.*, 149 N. Y. 223; *Knapp v. City of Brooklyn*, 97 N. Y. 520; *Sprague v. Parsons*, 11 Civ. Pro. Rep. 18.) The petition of the relator is insufficient in that it fails to state in two respects specific facts which, if undisputed, would clearly entitle him to the relief sought, viz.: As to the authority of the board of supervisors to pass the resolution for the grading and construction of Neptune avenue, and as to the sufficient performance of the work to entitle him to payment on account thereof. (L. 1881, ch. 554, § 1; *In re Freel*, 73 N. Y. S. R. 335; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Cohn v. Goldman*, 76 N. Y. 284; *People ex rel. v. Comrs. of Highways*, 54 N. Y. 276; *Sheridan v. Jackson*, 72 N. Y. 170; *Austin v. Goodrich*, 49 N. Y. 266; *People ex rel. v. Hayt*, 66 N. Y. 606; *In re Guess*, 38 N. Y. Supp. 91.) The proceedings of the grading commissioners, including the making of the contract to improve Neptune avenue, if made under the resolution of June 13, 1892, are invalid, for the reason that the resolution of that date authorizes the improvement of the avenue between the Ocean Parkway and West Sixth street, and between West Sixth street and the old line

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of lot 47, while the map, the assessment roll and the report of the commissioners show that the contract was only made for the improvement of the avenue for a portion of the distance, namely, between West Fifteenth street and the old line of lot 47. (*People ex rel. v. Bd. Supra.*, 89 Hun, 242; *Speir v. Town of New Utrecht*, 121 N. Y. 420.) The appointment of the grading commissioners on February 1, 1893, for the purpose for which they were appointed, viz., to grade Neptune avenue between West Fifteenth street and lot 47, did not make them even *de facto* officers, so that their subsequent acts became valid. (*Smith v. Mayor, etc.*, 37 N. Y. 520; *People v. White*, 24 Wend. 539; *Long v. Mayor, etc.*, 81 N. Y. 425; *In re Kendall*, 85 N. Y. 302.) The act of 1895 (Ch. 639), which substitutes a new scheme for local improvements in place of that provided in the act of 1893 (Ch. 171), was not in violation of the Federal Constitution. It simply substituted another remedy to the party interested without in any way interfering with his vested rights. (*Curtis v. Whitney*, 13 Wall. 68; Black on Const. § 192; *Lord v. Thomas*, 64 N. Y. 107.) The town of Gravesend is not authorized to issue bonds for this improvement unless the assessment for the same is, in all respects, legal and valid. (L. 1893, ch. 171.) This application must be denied, because the necessary persons are not parties to this proceeding. (L. 1894, ch. 449, § 6; L. 1895, ch. 639, § 2.)

BARTLETT, J. The relator is the assignee of a contract made on the 26th of February, 1893, with one John Curran by the grading commissioners of the former town of Gravesend in the county of Kings, for the construction and grading of Neptune avenue, between West Fifteenth street and old lot forty-seven, according to the specifications accompanying the contract, for the sum of \$290,000, payable in installments as work progressed.

Curran did a considerable amount of work, but died on the 21st of November, 1893, and his legal representatives executed an assignment of the contract to relator. The amount

now claimed by the relator as due him for work he has already performed is \$3,011.55.

The grading commissioners refuse to pay this amount on the ground that the moneys have not been raised by the supervisor of the town as required by law.

On the 25th of November, 1885, under the provisions of chapter 554 of the Laws of 1881, the board of supervisors of the county of Kings passed a resolution providing for the opening of Neptune avenue between West Sixth street and old lot forty-seven. Commissioners were appointed and the usual proceedings taken, and on the 7th of May, 1886, the Supreme Court made an order confirming the report of the commissioners and vesting the land condemned in the town of Gravesend for the purposes of a public highway between West Sixth street and old lot forty-seven.

On the 13th of June, 1892, the board of supervisors, under the act of 1881, provided by resolution for the grading of Neptune avenue between West Sixth street and old lot forty-seven, but nothing was done under this resolution, and, on the 12th of December, 1892, a second resolution was passed providing, among other things, for the closing of that portion of the avenue between West Sixth street and West Fifteenth street, for a change of the lines and for the opening and grading thereof between those points. Before anything was done under this resolution, and on the 30th day of January, 1893, a resolution amending and rescinding in part the resolution of June 13, 1892, was passed, so that it only provided for the constructing and grading of Neptune avenue between old lot forty-seven and West Fifteenth street. It was for this constructing and grading that the commissioners entered into the contract with John Curran, to which reference has been made.

Under chapter 118 of the Laws of 1892, as amended by chapter 171 of the Laws of 1893, provision was made for the issue by the supervisors of the town of Gravesend of the bonds of the town for the purpose of raising money to defray the expenses of constructing and grading streets and avenues therein.

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By chapter 449 of the Laws of 1894, entitled "An act to provide for the annexation to the city of Brooklyn of the town of Gravesend in Kings county," that town became the 31st ward of the city of Brooklyn, but it was expressly provided under section 6 of this act that all proceedings pending and unfinished for opening, grading and improving any street or avenue in the town should be continued and completed in the same manner and under the same laws and with the like effect as though the act had not been passed.

It was by reason of this exception, contained in the act of 1894, that the relator sought to compel the supervisor of the town of Gravesend and other officials to issue bonds under the act of 1893.

The Special Term held that the relator was entitled to the peremptory writ of mandamus compelling the issuance of the bonds to an amount sufficient to defray the expenses of constructing and grading Neptune avenue under his contract.

The Appellate Division reversed this order on the single ground that chapter 639 of the Laws of 1895, entitled "An act to provide for the payment of the cost of local improvements and bonds issued for the payment thereof in the late town of Gravesend, now the 31st ward of the city of Brooklyn," established a new and complete scheme applicable to the changed condition of things arising out of the annexation of the town to the city, for the issue of bonds for all local improvements (except sewers) not yet paid for in the late town of Gravesend, and that the act of 1893 must be deemed repealed.

We are of opinion that the court below overlooked the fact that, while the act of 1895 constitutes a commission for the purpose of ascertaining and determining the amounts due and unpaid upon bonds issued for certain local improvements in the late town of Gravesend, including the continuance of work of like character now in progress and unfinished, as they in their discretion may determine ought to be completed, nevertheless their awards and findings upon any of the claims or matters submitted for their investigation and report, are

only binding upon such persons as voluntarily appear before them and submit to their jurisdiction. (Ch. 639, Laws of 1895, § 1.)

It is not claimed that the relator has sought to avail himself of the provisions of this act, nor is it reasonable to suppose that he would submit the question of whether or not the work under his contract on Neptune avenue should be completed, to the discretion of these commissioners.

If, as the court below seems to have held, the act of 1895 compelled the relator to submit his rights to the commissioners named therein, it would clearly be unconstitutional as impairing the obligation of his contract.

It is quite obvious, however, that the legislature contemplated no such result, and simply created a commission before whom parties might voluntarily appear for the adjustment of their rights.

This is in harmony with the provisions of the Annexation Act of 1894, already referred to, for continuing all unfinished street-opening proceedings, and allowing their completion under the same laws and with like effect as though the act of 1894 had not been passed.

On the present appeal the respondent presents additional points in support of the order of the Appellate Division refusing relief to the relator.

It is urged that the papers of the relator are insufficient, if uncontradicted, to authorize the granting of the writ.

While some of the statements of the petition are very general, yet, as they stand uncontradicted except as modified by a single averment in the opposing affidavits that will presently be considered, they must be taken as true on this appeal. (*People v. R., W. & O. R. R. Co.*, 103 N. Y. 95.)

The existence of the contract, its assignment to relator, and the engineers' certificate thereunder in relator's favor, are all alleged in general terms, and stand admitted.

It is argued that the grading commissioners who made relator's contract with Curran must have been appointed under the resolution of June 13th, 1892, and that the resolutions of

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December 12th, 1892, and January 30th, 1893, did not in any way qualify or control their appointment.

If this position can be maintained the law laid down in the first proceeding, which was under the resolution of June 13th, 1892, must control the case now before us, and the appointment of the grading commissioners is to be regarded as covering only a part of the work contemplated, and, therefore, void. (*People ex rel. Dady v. Supervisor*, 89 Hun, 241.)

We have heretofore referred to the substance of these resolutions, and it is sufficient now to say that the effect of the resolutions of December 12th, 1892, and January 30th, 1893, is to so amend the resolution of June 13th, 1892, as to limit the work of constructing and grading Neptune avenue to the portion thereof between West Fifteenth street and old lot forty-seven, and covered by the relator's contract, and consequently the appointment of grading commissioners for that portion of the original work contemplated by the resolution of June 13th, 1892, is regular, unless the point taken by the respondent in his opposing affidavits must be sustained, to the effect that, as the resolution of January 30th, 1893, was not approved by the supervisor at large until February 2nd, 1893, and was not valid until so approved, it follows that the certificate of appointment of the grading commissioners, bearing date February 1st, 1893, is void.

The certificate of appointment refers in express terms to the resolutions of June 13th, 1892, and January 30th, 1893.

By resolution No. eight, section 18, of the supervisors of Kings county, it is provided that after the filing and confirmation of the report of the opening commissioners the supervisor of the town of Gravesend shall appoint three grading commissioners, who shall take an oath of office and file it with the town clerk. It follows that this appointment was not complete until the official oath was duly taken and filed. The oath was taken on the 4th day of February, 1893, two days after the supervisor at large had approved the resolution of January 30th, 1893, and the appointment of the grading com-

missioners and their oath of office were not filed with the town clerk until February 5th, 1893.

The appointment, therefore, was not fully completed until after the resolution under which it was made was in full force and effect.

We hold that the grading commissioners were lawfully appointed and the contract sought to be enforced by the relator is valid so far as it is affected by the regularity of this appointment.

It is further urged that, assuming this proceeding is proper, there is a defect of parties, as not only the supervisor of the town of Gravesend, but the town treasurer and clerk, who must join in the execution of the bonds, are necessary parties. It is a complete answer to this suggestion that the grading commissioners refused relator payment for the alleged reason that the supervisor of the town had not raised the money in the manner provided by law. It is fair to assume if the courts direct the supervisor to perform his duty in the premises the other town officials will respect the decision and obey it.

Several questions were argued that are not properly here, as they should have been presented on the motion to confirm the report of the opening commissioners laying out Neptune avenue.

The order of confirmation is in the nature of a judgment and cannot be attacked collaterally at this time. We do not regard any of the points urged as jurisdictional and rendering the original proceeding to lay out the avenue void. The order of confirmation has stood unattacked since March, 1886.

We have considered all the points discussed, but will not deal with them further in detail except to say that we do not think any modification of the order of the Special Term is necessary, as bonds need not be issued from time to time beyond the amount necessary to pay the relator such sums as may be justly due him under proper certification.

It may be a hardship for the taxpayers of the former town of Gravesend, now the 31st ward of the city of Brooklyn, to be compelled to proceed with the opening and grading of that

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portion of Neptune avenue lying between West Fifteenth street and old lot forty-seven, but the court can afford no aid if the officials of the town in times past have acted with bad judgment and extravagance. Our sole duty is to determine whether their action conformed to the strict provisions of the law then existing.

There is no attack on the good faith or honesty of the deceased contractor or his assignee, the relator, and their rights must be protected.

The order of the Appellate Division should be reversed and the order of the Special Term affirmed, with costs.

All concur, except ANDREWS, Ch. J., not voting, and VANN, J., not sitting.

Ordered accordingly.

154	891
156	655

EDWARD J. PATTERSON, as Administrator of JENNIE PATTERSON TOWNSEND, Deceased, Appellant, v. THE CITY OF BINGHAMTON, Respondent.

MUNICIPAL CORPORATIONS — ACTION TO RECOVER AWARD FOR LAND TAKEN FOR STREET — REMEDY PROVIDED BY CHARTER. While the city of Binghamton was taking the necessary legal steps, under its charter, to pay an award for land condemned by it for street purposes into court (by reason of a contest between the original owner of the land and a person who had purchased it on a foreclosure sale after the award had become final), and on the day on which the mayor approved the resolution of the common council for such payment, the original owner began a common-law action against the city to recover the award. On the next day the award was duly paid into court. The city charter provided a speedy and sufficient method for a judicial determination of adverse claims to awards so paid into court. *Held* (without determining under what circumstances a common-law action will lie to recover an award in the custody of a municipality), that, under the facts disclosed, the action was improperly brought, at a time when it could not be justified, and that a dismissal of the complaint, on the ground that the plaintiff's remedy was confined to the proceedings pointed out by the charter, was proper.

Patterson v. City of Binghamton, 4 App. Div. 615, affirmed.

(Argued October 15, 1897; decided November 30, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 30, 1896, which affirmed a judgment dismissing the complaint entered upon a decision of the court on trial at Circuit, a jury having been waived.

This action was commenced in the name of Edward J. Patterson and Jennie Patterson, plaintiffs. Thereafter Jennie Patterson died, intestate, bearing the name of Jennie Patterson Townsend by marriage. Edward J. Patterson was appointed her administrator, and his personal interest was transferred to the administrator, and Edward J. Patterson, as such administrator, was substituted for the original plaintiffs herein, the action being continued in the name of such administrator as sole plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinions.

Roger P. Clark for appellant. Plaintiff can maintain an action for the award. (*Sage v. City of Brooklyn*, 89 N. Y. 189; *Supervisors of Erie v. City of Buffalo*, 63 Hun, 567; *Ganson v. City of Buffalo*, 1 Keyes, 456; *Smith v. City of Buffalo*, 44 Hun, 156; *People ex rel. v. Miller*, 39 Hun, 557; 114 N. Y. 636; *Buck v. City of Lockport*, 6 Lans. 251; *Fisher v. Mayor, etc.*, 57 N. Y. 344; *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 170; *Wood v. Suprs. Monroe Co.*, 50 Hun, 6; *In re Hatch*, 11 J. & S. 91.) Plaintiff is the owner of the award, and it did not pass to the purchaser of the land on the sale under the foreclosure of the mortgage. (*People ex rel. v. Com. Council of Syracuse*, 78 N. Y. 59; *In re Dept. of Parks*, 73 N. Y. 565; 6 Am. & Eng. Ency. of Law, 626; *People ex rel. v. Brooklyn*, 1 Wend. 323; *Suprs. of Erie v. City of Buffalo*, 63 Hun, 568; *Reinhardt v. City of Buffalo*, 39 N. Y. S. R. 305; *Hawkins v. Trustees of Rochester*, 1 Wend. 53; *Mayer v. Mayor, etc.*, 101 N. Y. 288; *King v. Mayor, etc.*, 102 N. Y. 175; *Cassidy v. Mayor, etc.*, 62 Hun, 367; *Sage v. City of Brooklyn*, 89 N. Y. 189.) The defense, that the proceedings of the city of Binghamton

were so defective as to make void the award, is untenable. (2 Herman on Est. & Res Judicata, 1366, § 1222; *Chicago v. Wheeler*, 25 Ill. 478; *People v. Lowell*, 9 Mich. 144; *Sage v. City of Brooklyn*, 89 N. Y. 189; *Buell v. Village of Lockport*, 8 N. Y. 57; *Viele v. T. & B. R. R. Co.*, 20 N. Y. 187; *In re Washington St.*, 38 N. Y. S. R. 346; *Grunberg v. Blumenthal*, 66 How. Pr. 62; *In re Cooper*, 93 N. Y. 512; *Reinhardt v. City of Buffalo*, 39 N. Y. S. R. 305; *Mayor, etc., v. M. R. Co.*, 143 N. Y. 26; *In re Woolsey*, 95 N. Y. 135; *People ex rel. v. Trustees of Haverstraw*, 80 Hun, 385; *Akin v. Water Comrs.*, 82 Hun, 267.)

Alex Cumming for respondent. The right to the award was disputed, and the act of defendant in paying the amount awarded to the office of the clerk of the county of Broome, as clerk of the Supreme Court, with a copy of the resolution of the common council, was a compliance with the provisions of section 10, title 7, of the charter, and a defense to this action. (Dillon on Mun. Corp. §§ 94, 993; *R. R. Co. v. Mayor, etc.*, 1 Hilt. 562; *Heiser v. Mayor, etc.*, 104 N. Y. 68; *Beach v. Newark*, 33 N. J. L. 129; *Cassidy v. City of New York*, 62 Hun, 358; *Lansing v. Smith*, 4 Wend. 10; *People v. Earl*, 16 Abb. [N. S.] 64; *Swift v. Mayor, etc.*, 83 N. Y. 528; *Donnelly v. City of Brooklyn*, 121 N. Y. 9; *In re Church*, 92 N. Y. 1; *Stuart v. Palmer*, 74 N. Y. 185.) Should the question discussed in point one be waived, mandamus and not action would be the proper and only remedy. (*In re Church*, 92 N. Y. 1; *Swift v. Mayor, etc.*, 83 N. Y. 528; *Donnelly v. City of Brooklyn*, 121 N. Y. 9; *People v. Earl*, 16 Abb. [N. S.] 64; *People ex rel. v. Brennan*, 45 Barb. 457.) The foreclosure of the mortgage given by the Pattersons, and the sale thereunder, cut off all their title and equity of redemption to the premises, and to the award and amount awarded for taking same for street purposes. (*Hooker v. Martin*, 10 Hun, 302; *Bank of Auburn v. Roberts*, 45 Barb. 407; 44 N. Y. 192; *In re John & Cherry Sts.*, 19 Wend. 659; *Utter v. Richmond*, 112 N. Y. 610; *Gates v. De La Mare*, 142 N. Y. 307;

Magee v. City of Brooklyn, 144 N. Y. 265; *Delap v. City of Brooklyn*, 144 N. Y. 265; *In re Thompson*, 89 Hun, 32; *Packer v. R. & S. R. R. Co.*, 17 N. Y. 287; *Jones on Mort.* § 1652; *Reign v. Parker*, 8 Cush. 145.) The condemnation proceedings were defective and failed to comply with the requirements of the charter of the city of Binghamton or to confer any right on the County Court to appoint the commissioners to ascertain and report the just compensation to be paid to the owners of the property proposed to be taken for the opening of Henry street. (*In re City of Buffalo*, 78 N. Y. 362; *Dillon on Mun. Corp.* §§ 604, 605; *Beach on Pub. Corp.* § 665; *Cruger v. H. R. R. Co.*, 12 N. Y. 190; *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546; *In re S. I. R. T. Co.*, 103 N. Y. 251; *N. Y. C. Co. v. Mayor, etc.*, 104 N. Y. 1; *In re R. E. R. Co.*, 123 N. Y. 351; *In re P. B. Co.*, 108 N. Y. 483.)

A. D. Wales for Binghamton Opera House Company. The plaintiff cannot maintain this action because an action at law is not the proper remedy. (*Sage v. City of Brooklyn*, 89 N. Y. 189; *Heiser v. Mayor, etc.*, 104 N. Y. 72; *Reining v. N. Y., L. E. & W. R. Co.*, 128 N. Y. 170; *Calking v. Baldwin*, 4 Wend. 667; *Kimble v. W. W. V. C. Co.*, 1 Carter, 285; *Brown v. Beatty*, 34 Miss. 228; *Gowen v. P. R. R. Co.*, 44 Me. 140; *Town of Lebanon v. Olcott*, 1 N. H. 339; *Orr v. Quimby*, 54 N. H. 602; *Henniker v. C. R. R. Co.*, 29 N. H. 146; *McKinney v. M. N. Co.*, 14 Penn. St. 65; *Koch v. W. W. Co.*, 65 Penn. St. 288; *Fehr v. S. N. Co.*, 69 Penn. St. 161.) The Pattersons have no interest in the award. It passed to F. W. Downs on the foreclosure sale. (Code Civ. Pro. §§ 1671, 1672; *Rector, etc., v. Mack*, 93 N. Y. 488; *Mygutt v. Coe*, 8 N. Y. S. R. 434; *Kursheedt v. U. D. S. Inst.*, 118 N. Y. 358; *Batterman v. Albright*, 6 N. Y. S. R. 334; *Fuller v. Scribner*, 76 N. Y. 190; *Stevenson v. Fairweather*, 21 How. Pr. 449; *In re City of Rochester*, 136 N. Y. 83; *Gates v. De La Mare*, 142 N. Y. 308; *Magee v. City of*

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Brooklyn, 144 N. Y. 265.) The city is not estopped, either as a matter of law or equity, from raising the question of the validity and regularity of the condemnation proceedings. (*In re Comrs. of Wash. Park*, 56 N. Y. 150; *Hill v. Hill*, 4 Barb. 419; *Jackson v. Spear*, 7 Wend. 401; *Osterhout v. Shoemaker*, 3 Hill, 513; *Sparrow v. Kingman*, 1 N. Y. 246; *Glen v. Gibson*, 9 Barb. 634; *Green v. Collins*, 86 N. Y. 250, 251; *Douglas v. Cruger*, 80 N. Y. 19, 20; *Lytle v. Beveridge*, 58 N. Y. 606; *Lee v. Adsit*, 37 N. Y. 95.) The condemnation proceedings taken by the city were absolutely void from the many gross irregularities which existed therein. (*Merritt v. Vil. of Portchester*, 71 N. Y. 309; *Newell v. Wheeler*, 48 N. Y. 487, 490; *Peyser v. Mayor, etc.*, 70 N. Y. 497; *In re City of Buffalo*, 78 N. Y. 362; *Gilmore v. City of Utica*, 15 N. Y. Supp. 274; *Mills on Em. Domain*, § 101; *In re N. Y. & O. M. R. R. Co.*, 40 How. Pr. 335; *Rhemier v. Union*, 31 Minn. 289; *Anderson v. City of St. Louis*, 47 Mo. 479.) The right of the opera house company to insist upon its title to the land in question on account of the invalidity of the condemnation proceeding has in no way been waived. (*C. N. Bank v. Clark*, 139 N. Y. 307; *Burk v. Ayers*, 19 Hun, 23; *In re City of Rochester*, 136 N. Y. 89.)

BARTLETT, J. The duly constituted authorities of the city of Binghamton, in the year 1891, continued Henry street from Washington to Water streets, this work being known as the Henry street extension. Among other lands condemned for this purpose was a portion of the premises of the plaintiffs. This action is brought to recover the award in the condemnation proceedings.

The original answer in this case contained substantially an agreed state of facts, to which the plaintiffs demurred as not containing a defense.

The issue of law on this demurrer resulted in a decision in plaintiffs' favor, with leave to defendant to answer over. Under the amended answer the case has been twice tried. At the first trial a judgment was directed in favor of plaintiffs.

The General Term reversed on the ground that the plaintiffs' remedy was confined to the proceedings pointed out by the charter of the city of Binghamton. (88 Hun, 272.)

At the second trial the court followed the decision of the General Term and dismissed the complaint, and this judgment was affirmed. From this affirmance the present appeal is taken.

This case is presented under a stipulation that the findings contain all the facts.

The question to be considered is whether this action at law will lie to recover the award under the peculiar circumstances of the case.

In April, 1891, a petition was presented to the common council of the city to open the new street and resulted in a resolution the following month to make the improvement and to appoint a commissioner to report upon the land required and the probable expense.

In June, 1891, this report was filed indicating the land required, including that of plaintiffs, and estimating the total expense. By reason of some irregularity a second commissioner was appointed for the purpose above indicated, who made a similar report on the 3rd of August, 1891.

Hearings were duly had before the common council, and resulted in a resolution on the 24th of August, 1891, describing the lands to be taken and the estimated cost, and directing the city engineer to make a survey of the proposed improvement with a map. This resolution was duly complied with.

In September, 1891, the common council passed a resolution declaring its intention to make the improvement, and issued a notice that an application would be made to the County Court for the appointment of three commissioners to ascertain and report the compensation to be paid to persons and associations whose property was to be taken.

The court duly appointed the commissioners, who made a report fixing awards and giving to the plaintiff \$6,270. This report was filed with the common council under the provisions of the charter, and no appeal having been taken the awards named therein became final on the 5th day of November 1891.

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The building on the premises of the plaintiffs was valued at \$100 for the purpose of removal, and the plaintiffs having elected to remove the same, their award was reduced to \$6,170.

On the 30th of November, 1891, the common council directed the commissioners to proceed to assess the benefits and make out an assessment roll to pay the awards in pursuance of the charter. These assessments were duly made and the money received by the city to pay the awards and expenses.

The precise date when the tax was collected and the city received the money does not appear in this record.

Under the charter of the city of Binghamton, the municipality acquired an easement over the lands condemned, and not an absolute fee. This easement involved the greater portion of the plaintiffs' property, leaving narrow strips or parcels thereof on the north and south sides of the street.

It seems to be conceded that the portion of the premises not taken was of comparatively little value, and the lot of plaintiffs was substantially condemned by the city.

At the time these condemnation proceedings were instituted, the Binghamton Trust Company held a mortgage thereon to secure the payment of \$3,000 and interest. There were also a second mortgage on the premises to secure the payment of \$800, a third mortgage for \$500, and a considerable number of small judgments.

On the 12th of September, 1891, the Binghamton Trust Company began a foreclosure of its mortgage, and all of these liens were at the time unsatisfied. The sale in foreclosure was made by the referee on the 6th day of February, 1892, and the premises were struck off to Francis W. Downs for the sum of \$6,525.

The judgment of foreclosure was duly satisfied, together with all the liens upon the premises, and there remained a surplus of \$700, which was paid to plaintiffs in this action.

It is found that the plaintiffs duly demanded payment of the award, which was refused, and on the 17th day of August, 1892, they brought this action to recover the same.

It is further found that, six days prior to the institution of this suit, and on the 11th day of August, 1892, the common council passed a resolution reciting that the right to the award made to the plaintiffs was disputed and that a warrant be drawn for the amount of it in favor of the office of the clerk of the county of Broome and delivered to him, and that the corporation counsel prepare the proper statements and papers to accompany payment as provided by the city charter.

Under the charter the mayor of the city has a week in which to approve any resolution passed by the common council, and six days after the passage of this resolution, to wit, on the 17th day of August, 1892, the mayor duly approved it, and the next day, the 18th day of August, 1892, the award was duly paid to the county clerk as the clerk of the Supreme Court.

It thus appears that while the city was taking the necessary legal steps to pay this award into court, by reason of the contest between the purchaser at the foreclosure sale and the plaintiffs, this action was commenced on the day the mayor approved the resolution of payment and the day before the money was actually paid into court.

We here have the entire amount of the award in cash placed in the custody of the court to pay the plaintiffs or the purchaser at the sale, as their rights may be made to appear.

From this point on the city of Binghamton was in the attitude of a stakeholder admitting liability by paying the fund into court. The claimants were not only abundantly secure with the fund in the possession of the court, but the city charter provided a speedy and sufficient remedy for a determination of the adverse claims, it being the duty of the clerk at the first term of the Supreme Court, Special or General, held in the county, after receipt of the moneys, to make a report of the amount thus deposited, and the court is required at that term to order the investment of the money or the payment over on the ascertainment of the person entitled thereto. (Charter, title VII, section 10.)

This is a proceeding in which the city has no interest what-

ever. This action was begun at a time when it cannot be justified, and seems upon its face to have been an effort to anticipate the final act of payment into court after the resolution of the common council authorizing it to be done. The approval of the resolution by the mayor, as already pointed out, was August 17th, and the payment August 18th, which was certainly most speedy action, when we consider that not only was the warrant to be drawn, but the corporation counsel had to submit therewith certain statements.

We are not called upon to determine at this time under what circumstances a common-law action will lie to recover an award in the custody of a municipality, but we hold that, under the facts now disclosed, this action was improperly brought, and there was no error in dismissing the complaint.

The judgment appealed from should be affirmed, with costs.

O'BRIEN, J. (dissenting). This action was commenced on the 17th day of August, 1892, to recover the amount of an award of damages for the taking of the plaintiff's land for street purposes. On a trial before the court the plaintiff recovered. The judgment was reversed by the General Term and a new trial granted. (88 Hun, 272.) On the second trial the court, following the view of the General Term, dismissed the complaint, and the judgment having been affirmed by the Appellate Division (4 App. Div. 615), the plaintiff has appealed to this court.

The case has always been and is now embarrassed by many collateral and irrelevant considerations. The complaint states a very simple cause of action at law for the recovery of money only. It alleges that in the year 1891 the plaintiff was the owner in fee simple and in possession of a parcel of land in the city of Binghamton; that the authorities of that city in the month of May of that year duly instituted proceedings under its charter to lay out a street fifty feet wide through the land; that thereafter such proceedings were duly had and it was duly determined that the street should be laid out over a portion of the land, and that it was laid out prior

to the 22d day of October, 1891; that commissioners were duly appointed in the proceedings for the purpose of ascertaining and awarding to the plaintiff damages as compensation for the land so taken, and that the commissioners made an award in writing to the plaintiff, as his damages for laying out the street, in the sum of \$6,270; that no objections were ever filed by the city to this award; that it became effectual, due, payable and incontestable in the month of November, 1891, when the final determination of all proceedings in which the said award was made occurred; that no appeal was ever taken from the award, or from any of the proceedings connected with the laying out of the street; that the provisions of the defendant's charter required it to pay the plaintiff the award at once upon the termination of the proceedings; that demand has been made of the defendant for the payment of the same, but it has neglected and refused to do so.

It will be seen, therefore, that the plain purpose of the action was to enforce an obligation on the part of the defendant for the payment of money which should have been paid during the month of November, 1891. There is really no contest with respect to the facts stated in the complaint. The only defense interposed is based upon the following facts, stated in the defendant's answer:

First. That on June 15th, 1888, the plaintiff executed a mortgage on the land, with other lands, for \$3,000, to certain parties named, and, subsequently, other junior mortgages to other parties.

Second. That on the 12th of September, 1891, before the award was made, the Binghamton Trust Company, then owning and holding the first mortgage above described, commenced an action to foreclose the same, and judgment in that action was entered on the 4th of December, 1891, which determined that there was \$3,179.50 due upon the mortgage, and directed a sale of the premises in the usual form. This mortgage covered a parcel of land in the city of Binghamton, from which the land for the street had been taken as above described.

Third. That on the 6th of February, 1892, in pursuance of the judgment, the premises described in the mortgage were sold to one Francis C. Downs for the sum of \$6,525, which sum was not only sufficient to pay the mortgage, but also all subsequent or junior liens upon the premises.

Fourth. That six days thereafter, and on the 12th of February, 1892, Downs, the purchaser at the foreclosure sale, conveyed the premises so purchased by him to the Binghamton Opera House Company for the consideration of \$6,525.

Fifth. The defendant then alleges, upon information and belief, that the award in controversy passed to Downs with the lands upon the sale, and in the same way to the opera house company.

Sixth. It is then alleged that the opera house company, claiming to own and to be entitled to the possession of the premises so taken by the defendant for the purposes of a street, and for which the award was made, brought an action against the defendant in the Supreme Court, which is still pending and undecided, in which it is alleged that no valid or legal appropriation or condemnation of the land, or award therefor, was ever made, and that the defendant has no right or title to the premises; that no jurisdiction to make the award was ever acquired, and that judgment for the recovery and possession of the property is demanded.

The trial court has found all the material facts stated in the complaint, and also the facts alleged in the answer touching the execution of the mortgage and the foreclosure thereof, and sale under the judgment.

The opera house company is not a party to this action. It was not a necessary party for any purpose which the plaintiff had in view, but it was undoubtedly a necessary party for the protection of the defendant's rights, and could have been brought in as a defendant upon its application. There is nothing in the record to show that the opera house company makes any claim to this award. On the contrary, the record shows that it disclaims any right to it; since it has commenced an action of ejectment to recover the land it cannot, of course,

at the same time, claim the award. To insist that it owns the award would be to defeat its action of ejectment for the recovery of the land. If it owns the award, it certainly does not own the land. Moreover, it has elected as its remedy to follow the land, upon the theory that all proceedings for its condemnation and appropriation by the city were void, including, of course, the award in question. The only issue in this case, therefore, is between the plaintiff and the defendant, and the only defense pleaded is, in effect, that the plaintiff has no right of action to recover the award in question, since he is not the owner thereof.

The defense interposed is that the award in question represents land which was originally embraced in the mortgage; that the award when made became appurtenant to the estate conveyed by the mortgage, and that upon the sale of the land under the judgment of foreclosure the award passed with it as a part and parcel of the estate conveyed, without any special words of assignment. Upon this proposition the defendant must either stand or fall. We are not concerned with any claims of the opera house company. They must be determined in the action brought for that purpose and not in this action.

The defendant, when sued by the plaintiff for this award, had a simple and effectual remedy for its protection against conflicting claims. It could have paid the fund into court and interpleaded the conflicting claimants, if any, for the purpose of settling their own controversy, with respect to the ownership of the award, between themselves, and it could then have been discharged from the litigation. For some reason this course has not been pursued, and it seems that the defendant is in the attitude of defending two separate actions at law, one by this plaintiff for the recovery of the award, and the other by the opera house company for the recovery of the land. But the question now is whether it has any legal defense to the plaintiff's cause of action.

This brings us to the consideration of the question whether the award passed to the purchaser upon the referee's sale. Of

course, if it did pass under the judgment of foreclosure it would also pass on a sale under execution, and if this award which represented the damages which the plaintiff sustained by the taking of his land for street purposes would pass by a sale under foreclosure, or on execution, so would a judgment which he had recovered against some trespasser or wrongdoer for injury to the land embraced in the mortgage.

Of course, if the award passed upon the sale of the land by the referee under the judgment of foreclosure and vested in the purchaser, it must also pass under every subsequent sale to every subsequent purchaser so long as it remained unpaid.

That such a contention can find no support in the law of this state will be seen from the authorities on the subject. It is not true that an award made to the owner of the equity of redemption for damages to the land during the period of his ownership is land. In equity it is treated as land for one purpose only, and that is for the purpose of meeting any deficiency that may arise upon foreclosure of an existing mortgage which was a lien upon the land when taken by the city. For every other purpose it is a claim or right personal to the owner of the equity of redemption. It is personal property that passes at death to the personal representatives and not to the heir. (*Ballou v. Ballou*, 78 N. Y. 325.) It is a chose in action incapable of sale upon execution. It is in the nature of a judgment between the parties, conclusive of the rights of either or both. It is, in a broad sense, a contract within the meaning of that provision of the Constitution of the United States which forbids the impairment of contracts by state legislation. (*People ex rel. Reynolds v. Common Council of Buffalo*, 140 N. Y. 300.)

When the award was made it vested in the owner of the land, subject to the equitable lien of the mortgagee for any deficiency in the mortgage debt that arose upon a sale of the property. The equitable lien of the mortgagee is personal to him and for his security only. If, upon the sale under the foreclosure judgment, there is no deficiency, then there is no longer any lien upon the award. Neither the mortgagee nor

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the referee at the sale can transfer to the purchaser any right to the award any more than they can sell the personal bond of the owner which the mortgagee holds as a personal security for the debt. If the award passes at all to the purchaser it must be at the moment of the sale and it must pass in every case, whether there is a deficiency or not. Thus the mortgagee, for whose sole benefit equity impresses a lien upon the award, would always lose the benefit of this lien, since it can never be ascertained whether there will be a deficiency or not until after the sale when, upon the contention in this case, the title to the award will have passed with the land to the purchaser.

The title to an award for damages made to the owner of the equity of redemption never passes, under the circumstances of this case, to the purchaser upon a sale under a judgment of foreclosure any more than a judgment in favor of the owner against a trespasser for injury to the freehold which impaired the security of the mortgagee. The mortgagee in case of a deficiency may reach the award, so far as necessary to meet such deficiency, by an independent proceeding in equity, and with this qualification the owner of the equity of redemption has the whole legal and equitable title and right to the award when made to him.

There is no authority for the contention that an award passes upon a sale and conveyance of land as a part of the estate conveyed or appurtenant to it, but the contrary has been decided in numerous cases. It will not pass by a conveyance of the owner unless specially assigned or described, and for a greater reason it will not pass by a deed from a referee upon a sale under a mortgage acting in the execution of a mere power of sale.

A conveyance by a referee under a judgment of foreclosure has no other effect than is prescribed by statute. It vests in the purchaser only the same estate as the mortgagee would have acquired by foreclosing the equity of redemption. (Code, § 1632.)

The contention of the defendant in this case, that such a

deed had not only the effect of vesting the purchaser with title to the land remaining after the easement for a street was taken, but that it also swept away every vestige of title which the plaintiff had to personal property of the value of more than \$6,000, cannot be upheld. There is no principle of law or equity upon which to build such a claim. This money did not even represent any land that the referee sold or that the purchaser bid upon, but land that the city had taken for public purposes three months before to the knowledge of all the parties to the transaction. Every one knew that the sale and the bid and the conveyance related only to what was left. This appears from the record, and no one makes any claim to the contrary. It is admitted that the part of the mortgaged premises so sold and purchased commanded a price sufficient to pay the mortgage and all other liens. That certainly disposed of all claim on the part of the mortgagee. His debt was paid and his mortgage was extinguished. The purchaser never had any claim on the award or the land that it represented. He got just what he bid upon, and purchased, namely, the balance of the land. It is not even claimed that he was deceived or defrauded, or that he acted under any mistake. He has never asked to be relieved from his bid or to reopen the sale on any such grounds, which he might have done had the grounds existed. Neither the purchaser nor his grantee are making any claim before this court or elsewhere that the award in question passed to them upon the sale by the referee. The city is the only party that raises any such question. All the interest that it can possibly have in the question is to pay the award to the rightful owner and to be discharged from all liability. We have no equities to deal with, but only the naked proposition that, upon a sale of land by a referee and judgment of foreclosure, an award for damages, made three months before, to the owner of the equity of redemption, passes to the purchaser because it represents the value of an easement taken by the city for a street over part of the land mortgaged; and that although both the mortgagee and the bidder at the sale knew perfectly well that

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the easement had been excluded from the mortgage and judgment, and, hence, could not possibly pass upon the sale.

The question is not even whether some other person may not have some equitable interest in the award before distribution, but whether the plaintiff has been so completely divested of all interest as to disable him from maintaining an action against the city, which is concededly bound to pay it. Whenever there is a deficiency at a sale in the mortgage debt, there arises an equity between the owner of the equity of redemption and the holder of the mortgage which will be enforced against the award.

But there is no such equity between the mortgagor and the purchaser. The latter gets nothing but the legal estate. If the mortgagor holds a judgment or an award against a third party for damages, growing out of an injury to land, that does not pass to the purchaser and is not conveyed by the deed, unless in terms described therein, which is not claimed here. (*Donnelly v. City of Brooklyn*, 121 N. Y. 9; *McCormack v. City of Brooklyn*, 108 N. Y. 49; *Genet v. City of Brooklyn*, 99 N. Y. 300; *Sage v. City of Brooklyn*, 89 N. Y. 189; *Spears v. Mayor, etc.*, 87 N. Y. 359; *King v. Mayor, etc.*, 102 N. Y. 171; *Porter v. M. E. R. Co.*, 120 N. Y. 289; *McFadden v. Johnson*, 72 Pa. St. 335; *Losch's Appeal*, 109 id. 72; *Home Ins. Co. v. Smith*, 28 Hun, 296; *Matter of City of Rochester*, 136 N. Y. 83.)

In *Matter of the City of Rochester* (*supra*) Judge FINCH, speaking of an award of this character, said: "The appellant further contends that title to this fund passed to the respective purchasers upon the foreclosure sales under the two prior mortgages, upon the ground that the fund stood in the place of the land. It was to be so regarded for the purpose of measuring and settling the rights of the parties interested, but the paramount right of the city withdrew from the lien of the mortgages the water right, condemned and transferred it to the city free and discharged from the mortgage liens. That occurred before either sale. The balance of the land only could be sold and conveyed on the foreclosure; the ref-

eree's deed could convey and did convey only that balance ; and the right of the mortgagees became merely an equitable lien upon the fund in the hands of the court to the extent of any deficiency which the land sold did not pay. * * *

"Neither foreclosure gave title to the fund, or altered the duty of proper distribution by the court. That fund was the product of a paramount proceeding which cut off every right in the water, both of owners and incumbrancers, so that there could be neither sale nor foreclosure as to that, and instead there remained an equitable lien upon the proceeds to be worked out by the court empowered to distribute."

In *King v. Mayor, etc.* (102 N. Y. 172), the same learned judge, discussing the nature of a similar award in a controversy with respect to the party who owned it, described it as a right personal to the owner of the land, and not passing by deed unless expressly described and intended to be transferred. He said of the award in that case: "It was not in terms embraced in the deed, and was a mere right of action not running with the land. The damages were like those which follow a trespass or wrongful taking of property, although the wrong is made rightful by the legislative authority and the damages are awarded as compensation. That has been held in cases where a railroad corporation has taken an owner's land, and thereafter, but before actual assessment, the owner conveyed the land. The assessed damages have been awarded to the owner as not passing by the deed. (*Schuylkill Nav. Co. v. Decker*, 2 Watts (Penn.), 343; *McFadden v. Johnson*, 72 Penn. St. 335.)"

In the case of *Home Insurance Company v. Smith (supra)* there was a controversy with respect to the title to an award of this character, between parties claiming under a transfer from the original owner of the land, to whom the award had been made, and the purchaser under a mortgage sale. Judge DANIELS stated the principle by which the respective rights of such parties are to be determined in the following language: "By the confirmation of the award included in the commissioner's report, the part of the property taken for opening and

widening the avenue became vested in the city. (*Matter of Opening Eleventh Avenue*, 81 N. Y. 437, 453.) And this award was substituted for it. The fact that an appeal was taken from the order of confirmation and prosecuted until a final decision was obtained upon it, on the 18th day of October, 1881, in the Court of Appeals, in no manner changed the effect of the confirmatory order. For, by the final decision made that order was affirmed, and it consequently was left in full force and effect as it had been made by the Special Term in November, 1880. These proceedings therefore had as completely changed the title to so much of the land as was required for the avenue, as a voluntary conveyance of it, executed by David H. and John B. Dunham to the city would have done. And as they were at the time of the entry of the confirmatory order, the owners of the property, it followed that the award was payable to them, subject only to the previous satisfaction of the mortgage. To that extent and to that extent alone the lien of the mortgage was removed from the land and attached to the award made payable because of its appropriation. And for that reason the assignment of the mortgage by the mortgagee to the plaintiff, and its subsequent foreclosure and the sale had under it, entitled the purchaser to no more of the property than that remaining after excluding what was required for the street. That was all the land that the mortgage continued an incumbrance upon, after the residue had been devoted to a public purpose, and in case that failed to produce the mortgage debt the plaintiff, in that event, was entitled to resort to the award to make up the deficiency, but it had no other right or authority over it.

"The result of these considerations is that the purchaser, under the foreclosure judgment, obtained no title whatever to the award made for the land taken for the avenue; for having been acquired by means of the proceedings taken by the city, it was no longer liable to be sold under the mortgage.

"The lien upon it was divested and transferred to so much only of the award as might be required to extinguish it; and accordingly the assignment of it by the purchaser under the

judgment gave the plaintiff no legal right to the money in controversy. The circumstance that the title conveyed by means of a foreclosure is that incumbered by the mortgage at the time when it was given, will not change the rights of the parties in this respect. For the part of the land itself for which the award was made was as completely excluded by the proceedings from the mortgage as though it had never been incumbered by it.

"The rights of the parties, after that, were confined to the fund and not to the property out of which it originated. And the extent of that to which the plaintiff succeeded as the assignee of the mortgage was limited to the amount of money required for the payment of the mortgage debt after the sale of the remaining portion of the property.

"The right to the balance of the award, vested in the persons owning the equity of redemption. By virtue of their title, this money belonged to them, at least so much of it as would remain after the payment of the mortgage debt. That followed necessarily from the fact that they owned the property at the time when it was appropriated by virtue of the order confirming the report, subject only to the payment of this mortgage." The doctrine of this case was recognized recently in this court in *Gates v. De La Mare* (142 N. Y. 307), and its application pointed out by Judge ANDREWS in his opinion.

The same principle was decided by the Supreme Court of Pennsylvania, where it was held that the owner of land is the person entitled to the damages for taking a portion of it for a public street; that the damages are a personal claim of the owner of the property at the time of the injury and do not run with the land or pass by a deed though not specially reserved. (*Losch's Appeal*, 109 Penn. St. 72; *McFadden v. Johnson*, 72 Penn. St. 335.) Following those cases it was held in *Porter v. M. E. R. Co.* (120 N. Y. 289) that the owner of land having a claim for damages to it in consequence of the construction of an elevated railway was not divested of this claim by a sale of the land upon a judgment foreclosing a mortgage given prior to the injury, the sale being subse-

quent. This was upon the ground that the right of action for the injury while the mortgagor had title was personal to him and did not pass with the land to the purchaser at the sale. If the damages had been liquidated by a judgment or award, as in this case the principle would of course be the same.

The authorities cited establish two propositions applicable to this case: (1) That the referee upon the foreclosure sale sold and conveyed only that portion of the mortgaged premises which remained after the street had been laid out by the city. In the language of Judge DANIELS, that part of the land for which the award was made was as completely excluded by the proceedings from the mortgage as though it had never been incumbered by it. The referee sold only such portion of the land mortgaged as remained after the street was laid out. The purchaser bought nothing more. The paramount power of the city took out of the mortgage the right of way for the street, and the sale had no more effect upon it than if it had never been embraced in the mortgage. There is nothing in the case to show that there was any mistake made by the bidder at the sale as to the land sold or intended to be sold, and even if there was it could avail nothing in this action. But he took part in the proceedings under which the easement was taken and, therefore, knew that his bid was for what remained only. There is no question of equities between the parties, but only the bare question whether the plaintiff's title to the award was divested by the foreclosure sale. (2) That the award did not pass to the purchaser upon the foreclosure sale. It is undoubtedly true that the award was subject in the hands of the owner to the equitable lien of the mortgage to the extent of any deficiency which arose after the sale of the remaining land. The holder of the mortgage in case of such deficiency could enforce that lien by equitable proceedings, though the legal title was in the mortgagor. But there is no such question in this case, since it is undisputed that upon the sale the property remaining, after the street had been laid out, sold for not only enough to pay the mortgage, but all subsequent liens. There is no question here with respect to the

right of a mortgagee to reach a judgment or award representing an injury to the lands covered by his mortgage and which impaired its security. The mortgage has been paid and satisfied, and the simple question is whether the referee's deed upon the foreclosure sale vested the purchaser with the title to the award.

The cases which hold that the mortgagee may reach the award in equity to satisfy any deficiency in the mortgage debt, after sale of the remaining land, have no application to a case where there is no deficiency. The only question we have to deal with here is whether an award when made attaches to the land and becomes so appurtenant to it that it will pass upon a conveyance by the owner or by a referee under a power of sale contained in the mortgage. This question should not be confused with the equitable right of the mortgagee to pursue the award in equity for the purpose of satisfying any deficiency in his debt arising upon the sale. (*Gates v. De La Mare*, 142 N. Y. 307; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Utter v. Richmond*, 112 N. Y. 610.) There can be no question with respect to this right, but that does not prove that the plaintiff was divested of his right of action upon the award by the referee's sale of the land, or that such a sale passes title to the award with the land.

It is quite clear, I think, that it will not. The equitable lien of the mortgage upon an award for the taking of land is inconsistent with such a principle. If the award passes by the sale to the purchaser it must follow that all equitable claim upon it by the mortgagee must cease, since the purchaser and the mortgagee could not have the award at the same time.

It is manifest, therefore, that the defendant cannot defeat this action upon the ground that the plaintiff was divested by the sale under the foreclosure judgment of his right of action upon the award. On the contrary, the plaintiff has as good a title to the award now as he had before the sale was made.

This case seems to have been decided in the court below, not upon any distinct ground that the plaintiff was not the owner of the award, but on the ground that, under certain

peculiar provisions of the city charter, an action was not the proper remedy.

It was said in *Donnelly v. City of Brooklyn* (*supra*) that the liability of a municipal corporation to pay for property taken under the right of eminent domain, for public use, is a common-law liability, and that a common-law action was the suitable and appropriate remedy for the enforcement of such liability. The same doctrine was asserted in the Supreme Court of the United States in *Kohl v. U. S.* (91 U. S. 367) and in *Supervisors of Erie v. City of Buffalo* (63 Hun, 565).

The right of the owner of land to whom an award has been made as compensation for the taking of his property for public use, under the right of eminent domain, to maintain an action for the recovery of such compensation, has been so often decided by this court that it is useless to cite authorities in support of it. The right of the legislature to abridge that remedy, and to turn the owner over to some other proceeding, was discussed by Judge ANDREWS in the case of *Sage v. City of Brooklyn* (*supra*), in the following language: "It is so axiomatic, that it is laid up as one of the principles of government, that a provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property under the right of eminent domain. (*Gardner v. Vil. of Newburgh*, 2 Johns. Ch. 168.) The courts in construing the constitutional guaranty, have departed from what may seem its plain and natural meaning, and have held that the payment for property taken *in invitum* for public use, need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking, also provides a sure, sufficient and convenient remedy by which the owner can subsequently coerce payment by legal proceedings. If such provision is not made, then, as was said by NELSON, Ch. J., 'the law making the appropriation is no better than blank paper.' (*People ex rel. Utley v. Hayden*, 6 Hill, 359.) It is, I think, a plain proposition, that a law authorizing the taking of a man's land, and remitting him for his sole

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Dissenting opinion, per O'BRIEN, J.

remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate provision, dependent upon no 'hazard, casualty or contingency whatever,' such as law and justice require to meet the constitutional requirement. The pledge of the faith and credit of the state, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law. But a remedy for compensation, contingent upon the realization of a fund from taxation for benefits within a limited assessment district, does not meet the constitutional requirement."

According to this doctrine, which is undoubtedly sound, it was necessary in order to meet the constitutional requirement of compensation that the plaintiff should have the faith and credit of the city of Binghamton pledged for the payment of the property taken for its use. It was only because the city became responsible to the plaintiff for the award that the requirements of the Constitution were satisfied.

But it is said that the city has been discharged from this obligation without payment to the plaintiff of the award, and that he is turned over to pursue his remedy against an individual, or a public officer with whom the fund has been deposited.

The decision of the court below proceeded upon the ground that the constitutional obligation of the defendant to make compensation to the plaintiff for the land taken has been discharged by the following provision of its charter: "Title VII, § 10. Immediately after the final determination of all proceedings in which any award shall have been made, the common council shall cause to be paid or tendered to the respective owners the amount awarded to each respectively; in case any such owner shall refuse the same, or be unknown or a non-resident of the city, or for any reason be incapacitated from receiving

the amount, or the right thereto be disputed or doubtful, the common council may make payment of such amount to the office of the clerk of the county of Broome, as clerk of the Supreme Court, accompanied with a statement of facts and circumstances in each case, and a transcript of so much of the report of the commissioners as relates to the ascertainment of the amounts so paid in ; and the said clerk shall make a report to the Supreme Court at its first term, Special or General, held thereafter in the county, of the amount thus deposited, accompanied with the statement and transcript as aforesaid ; and the Supreme Court shall have authority, and it shall be its duty at such term of the court to order the investment of such money or the payment over on the ascertainment of the person entitled thereto. Upon such payment or tender, or payment to the clerk being fully made, the land may be taken by the city, pursuant to the resolution of the common council, declaring their determination to make such improvement, and the said street or other improvement may then be opened, worked and used."

It appears that, subsequent to the commencement of this action, the defendant paid the amount of the award in question to the clerk of the county of Broome, and such payment, it is said, has discharged it from all obligation to the plaintiff whose land was taken.

It is but fair to say that the city has not set up any such defense, and has not asked to be released on any such ground. In its answer, it stands squarely upon the proposition that the award passed to the purchaser with the land, and that the plaintiff has no interest in it. The court below, without passing upon that point, placed the decision on another ground which the defendant had not pleaded at all. The plaintiff could not avail itself of an event which transpired subsequent to the commencement of the action, such as payment, tender or deposit in court, without setting up the defense by supplemental answer under the provisions of the Code. (Code, § 544 ; *Hall v. Olney*, 65 Barb. 29.)

As before suggested, there is nothing in this record to show

that, since the commencement of this action, any one has made any claim to the award but the plaintiff. Mr. Downs, the purchaser, certainly has made no such claim. His grantee, the opera house company, makes no such claim, and is clearly in no position to make it, since it elected to bring ejectment for the land. The position which it has taken is clearly inconsistent with any such claim, and when a party elects to take one of two inconsistent remedies, it is bound by such election. The fact that the defendant has not invoked the protection of this statute by any pleading, and that there is no litigant upon this record or anywhere in sight seeking the money represented by the award, would be a sufficient answer to the point upon which the plaintiff was defeated below, quite apart from the fact that the defendant has not complied with the statute by filing the statement which it expressly requires.

But even if the defendant had in every respect complied with this statute before the commencement of the action, and had then pleaded it as a defense, it would constitute no bar to this action. The city cannot discharge itself from the constitutional obligation to make compensation to the owner for the land taken by paying the fund over to an individual, or a public officer, leaving the owner to pursue it in the hands of parties who may or may not be responsible. The legislature cannot take away the remedy against the city, upon whose faith and credit alone compensation was made secure and certain to the citizen whose property was taken, and leave him to pursue the clerk of the court or some other officer. Of course, if the legislature can relieve the city from its constitutional obligation upon deposit of the fund with the clerk of a court, it can do it upon deposit in a bank or with its own treasurer, or a county treasurer. Every statute should be construed as within the constitutional power of the lawmakers, and a meaning should not be imputed to it that would render it void or doubtful unless expressed in the clearest language.

The legislature has not attempted in this statute to abrogate or change any remedy for the recovery of the award that the owner had before. We have seen that the usual and ordinary

remedy of the owner, both at common law and under the various statutes, was an action for the recovery of money against the party whose duty it was to make the compensation. There is not a word in this statute which, in terms or by any fair implication, prohibits the plaintiff from pursuing the usual remedy by action against the city or discharges the city from its obligation to respond to the plaintiff in such an action. It permits but does not require the city, under certain circumstances, to place the fund in the hands of an officer for investment. The city is under no obligation to part with the money, but may retain it in its own custody. The permission is given in order to subserve its own convenience and not to discharge it from its constitutional obligations. It may place the money wherever it thinks proper, either in a bank or with its own treasurer, or the county clerk; but whatever it does with it, the constitutional obligation to pay the owner of the land remains. The plaintiff's right of action against the city could not be discharged in this way at its own election, and there was no intention to discharge it. No procedure whatever was provided by the statute or indicated in the charter to enable the owner to reach the fund. To say that the ordinary remedy of the owner was abrogated and that he was left to experiment with this statute in order to get the price of his land would be a most dangerous and extraordinary construction of the law. The statute does not profess to give any remedy at all, either by action, motion or mandamus, and, even if it did, it should be regarded under the plainest principles as cumulative and not exclusive, since it has often been decided that when the common law gives a remedy and another remedy is provided by statute the latter is cumulative unless made exclusive by the statute itself. (*Wetmore v. Tracy*, 14 Wend. 250; *Candee v. Hayward*, 37 N. Y. 653.)

It would be contrary to justice and to every principle of law for the protection of property rights, if a city could take private property, go into possession and use it for nearly ten months, and then, when sued by the owner to recover the

compensation awarded, deposit the money with the county clerk and defeat the action on the ground that it had, in this manner, become discharged from its constitutional obligation to make compensation.

With respect to the point that the plaintiffs have pursued the wrong remedy, it may be asserted upon principles of justice and as the result of all the authorities:

1. That the property owner must always be left a safe and adequate remedy to coerce payment for his property against the party bound to pay for it, otherwise the Constitution is not complied with.

2. That he cannot be deprived of the faith and credit of the city, or its legal liability to respond to him for the value of the property on any pretense whatever, and so the city continues liable till the award is paid.

3. The common-law action of debt is the usual and most appropriate remedy for the property owner, in which all questions touching his right to the award may be tried according to the usual and established rules of procedure, and in which he may have a jury trial when the issues are of such a nature as to permit that mode of trial.

4. The power of the legislature to deprive the property owner of the right to sue at law upon the award, is at least doubtful, and I have not been able to find any case in which this court has sanctioned such a power, but, on the contrary, the principles that underlie the exercise of the power of eminent domain are clearly against it.

5. But the legislature has not attempted, in this case, to exercise any such power. It has not prescribed any other remedy, and has not in words, or by implication, excluded the remedy by action or attempted to discharge the city from liability.

6. The city was not bound, under any circumstances, to part with the money, except to the owner of the award, and it cannot be assumed that the legislature intended to leave it in the power of the city to discharge itself from the common-law

liability by action in such cases at its own election, and thus deprive the property owner of the safe, convenient and adequate remedy for coercing payment which the Constitution required.

7. Special statutory remedies to the property owner for enforcing the award are for his benefit, and are simply cumulative. The award is a judgment within the meaning of the Statute of Limitations, and the action is not barred till after the lapse of twenty years, the same as other judgments. (*Donnelly v. City of Brooklyn, supra.*)

The time when the award vested in the property owner in this case, and the land vested in the city, was not decided in the court below, so far as appears from the opinion. Since this question has some bearing on some of the propositions asserted in this opinion, it may be useful to notice it.

The award was made and filed on the 27th day of October, 1891. Either party had ten days to appeal from it, but no appeal was made. At the end of the ten days it, therefore, became absolute and stood confirmed. The proceedings were then ended. Neither party could go any farther, and the rights of each became fixed. Final judgment determining the rights of both parties was then entered by operation of law. Neither could undo what had been done. The city could not discontinue and the owner could not reclaim his land or question the award. The rights of all parties then became vested. (*People ex rel. G. L. Co. v. Common Council of Syracuse*, 78 N. Y. 56.)

It is true that the charter does not, in terms, fix the time when the title to the land shall vest in the city, but it is clearly apparent from the general provisions. By section 9 of title 7 of the charter, power is conferred upon the city, after the award has been made and before making any assessment to pay the award for the land taken, to sell any building upon the land at auction upon public notice in case the owner fails to elect within six days after notice to remove it. The power to sell and give title to the buildings on the land in a city, which frequently constitutes the principal value of the thing taken,

plainly assumes that the title has passed to the party empowered to make the sale. The city cannot give any title to the buildings until it has itself acquired the title. The power thus conferred to sell the very property taken is equivalent to an express provision declaring that the title vests in the city when the award becomes absolute by the failure of both parties to appeal within the time prescribed by the statute. So that when the proceedings terminated in an award from which no appeal was taken, the right of action on the award vested in the property owner and the title to the easement for a street in the city. When the land was sold under the foreclosure judgment three months afterward, this easement had been severed from the mortgage lien as completely as if it had never been included therein. It could not have been sold and was not sold by the referee. The purchaser's bid was necessarily upon the land remaining, and that only was conveyed. The mortgagee realized sufficient to pay the mortgage in full, and thus the equitable lien upon the award in his favor was discharged. Mr. Downs, the purchaser at the sale, had participated in the proceedings to take the easement for a street as counsel, as appears from the record. He knew, therefore, that he could not buy what the city had taken, and that his bid was for what was left. There is no claim made upon the record that the property purchased, exclusive of the easement for a street, was not worth the amount of the bid. Nor is there any claim that he supposed, as matter of fact, that he was buying the award. Under these circumstances, it is quite difficult to perceive how the purchaser could get any more title to the award, which was a mere right of action, personal to the owner of the equity of redemption, than he could to the personal bond of the mortgagor, which was held for the same purpose, namely, of meeting a deficiency on a sale of the land in the debt secured by the mortgage; but since there was no deficiency the claim of the mortgagee upon the award, as well as his right of action on the bond, was discharged.

The learned counsel for the opera house company, which has an ejectment action pending against the defendant for the land,

was permitted to file a brief in this case and was heard at the argument. He and the learned counsel for the defendant differ widely with respect to some features of the case, but they are in perfect accord upon at least one point, and that is that the city has acquired no title to the land by reason of certain defects in the statutory proceedings under the charter. This position is of course essential to success in the suit by the opera house company for the land; but why the city itself should urge it as a defense to this action is not so clear. We can decide nothing in this case with respect to the merits of the controversy between the defendant and the company. But so far as that question is involved in this case, we think it clear that after the city has instituted and completed proceedings for the condemnation of the land, procured an award to be made to the owner, collected the money to pay the award by assessment upon the property benefited, has gone into possession of the land with the consent of the owner, and is using it now as a street, and with the money in its possession, or under its control, contributed specially by the taxpayers for the payment of this award, it cannot now be heard to question the validity of its own proceedings to defeat an action by one of the property owners upon the award. It is not open to the city, under the circumstances of this case, to make such an objection, or to raise such a question. The courts below have held that the proceedings on the part of the city to take the land were regular and valid in all respects. That part of the decision was in favor of the city since it affirmed its right to the land as against any party in this action. It has accepted the benefits of the judgment in that respect, and has made no appeal from any part of it. On the contrary, it is now asking this court to affirm the whole judgment. If it ever intended to raise any question as to the validity of its own proceedings it should at least have appealed from the judgment so far as it adjudged the taking of the land to have been in accordance with the statute, and with full jurisdiction on the part of the city authorities.

Moreover, no one can question the proceeding in this action

for mere error or irregularity. The award being in the nature of a judgment is not open to any collateral attack. It can be assailed only as void for want of jurisdiction, and there is no finding of fact or proof in the record upon which to base a jurisdictional defect. On the contrary, the findings are to the effect that the proceedings were regular and valid. The parties had the right of appeal to the court for the correction of any legal error or irregularity. It is found that after the termination of the proceedings, the city, with the consent of the owner, entered upon the land and is now using it for a street. Therefore, both parties have acquiesced in the validity of the proceedings, and neither can question them in this action, whatever may be the right of third parties.

It will be seen that Downs, who was the purchaser at the mortgage sale, has made no claim to this award. His grantee, the opera house company, makes no claim and can make none. It has elected to assail the whole proceeding as void for want of jurisdiction, and is bound by that election. There was never any ground for a claim on its part to the award, unless it be true, as matter of law, that it passes from one purchaser to another, down through the chain of title like a covenant of quiet enjoyment in a deed.

Suppose the defendant defeats this plaintiff in the present action, as it has thus far, and defeats the opera house company in its action of ejectment, as it has thus far, what will it do with the money collected to pay the award? The opera house company cannot change position and claim it after being defeated in the pursuit of another and inconsistent remedy, and the plaintiff's right to claim it will have been settled adversely to him.

It is proper before concluding the discussion to notice two cases cited by the defendant in support of its position. *Gates v. De La Mare* (142 N. Y. 307) simply decides what has so often been asserted in this opinion, that a mortgagee has an equitable claim upon the award, to the extent necessary for his protection. In that case the sale was made before the award was confirmed or the land taken, and the title to the

whole premises vested in the purchaser at the sale, so that, when the award was made he was the owner of the land. Moreover, it did not appear in that case, as it does here, that the mortgage had been satisfied by the sale of the remaining land. The doctrine laid down in the case of *Home Insurance Company v. Smith* (*supra*), though stated in the opinion, was not questioned, but the clear distinction between the two cases pointed out.

The other case is *Delap v. City of Brooklyn* (144 N. Y. 265). It belongs to a class of cases that this court has always regarded as *sui generis*. The land had been taken by force of a statute, but the city, for eighteen years, never entered upon it or claimed it. In the meantime the land had been bought and sold, and passed from one owner to another under deeds containing covenants of warranty, precisely as if the statute had never been passed. When, after the lapse of so many years, the city was called upon to pay awards, the question arose as to who was the owner. The city admitted it was liable to pay some one, and no one claimed the award except the plaintiff in the case, who had a deed of the whole land, with full covenants, when the action was brought. We held, under the circumstances of the case and the language of the several deeds under which the plaintiff derived title, that it was the intention of the grantors to assign the award, and that the plaintiff took it as assignee.

The case also decides that, under the same circumstances, a purchaser at a mortgage sale, before any award was made, took the award when made, since he was the owner of the land at that time, and no one else claimed the money.

These cases afford no authority for the contention that the plaintiff in this case was divested of the title to an award made to him, before any judgment of foreclosure, by a sale upon the judgment, three months after the award had vested in the plaintiff.

It seems to me to be for the best interests of the city to be relieved from its present position. The case should be remanded for a new trial, and the city can then obtain leave

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to bring the fund into court and require all parties who claim it to interplead and contest the question of title between themselves.

The judgment should be reversed and a new trial granted, costs to abide the event.

BARTLETT, J., reads for affirmance, and all concur except MARTIN, J., not sitting, and O'BRIEN, J., who reads for reversal. Judgment affirmed.

In the Matter of the Judicial Settlement of the Account of
MARIA B. MOEHRING, as Executrix of WILLIAM G. MOEHRING
Executor of SOPHIE MOEHRING, Deceased.

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MARIE HILL, Appellant; MARIA B. MOEHRING, as Executrix,
et al., Respondents.

1. **POWERS—PERSONAL PROPERTY.** The provisions of the Revised Statutes in regard to powers apply as well to powers concerning personal property as to those affecting real estate.

2. **WILL—BEQUEST CONFERRING ABSOLUTE POWER OF DISPOSITION.** A residuary bequest of personal property to one "absolutely during her lifetime, with the right to dispose of it at her death as she may deem fit," confers an absolute power of disposition, and as no remainder is limited upon the property the grantee takes an absolute title.

3. **EXECUTOR OF DECEASED EXECUTOR—ACCOUNTING—DELIVERY OF PROPERTY.** The power conferred upon the Surrogate's Court by section 2606 of the Code of Civil Procedure, in connection with section 2603, to compel an executor of a deceased executor to account for unadministered money or property of the first estate in his hands and to pay and deliver the same to the Surrogate's Court, or to his successor in office, or to "such other person as is authorized by law to receive the same," does not require the surrogate to direct payment or delivery to a legatee under the will of the first testator.

4. **PERSON AUTHORIZED BY LAW TO RECEIVE.** The phrase "such other person as is authorized by law to receive the same," does not include legatees or creditors of the first testator, to whom the property will ultimately belong, but relates to such other person as is authorized by law to receive the unadministered property of the first estate for the purpose of administration.

5. **EXECUTOR OF EXECUTOR CANNOT DISTRIBUTE.** While, under section 2606 of the Code, an executor of a deceased executor can be required to

deliver property in his hands to the Surrogate's Court or to a representative of the first estate, he cannot be required to act as a representative of that estate in distributing its unadministered assets.

Matter of Moehring, 19 App. Div. 629, affirmed.

(Argued November 22, 1897; decided November 30, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1897, affirming a decree of the Surrogate's Court of the city and county of New York.

The decree settled the account of Maria B. Moehring, as executrix of William G. Moehring, and directed the funds in her hands belonging to the estate of Sophie Moehring to be paid over to the chamberlain of the city of New York, unless an administrator with the will annexed of that estate should be appointed within sixty days.

In this proceeding the appellant made an application for an order or decree directing the payment to her of the portion of the estate remaining in the hands of the executrix. That application was denied. The appellant appealed to the Appellate Division from so much of the decree as denied her application, and the decision of the surrogate was affirmed.

The proceeding was first inaugurated by the petition of the appellant, upon which a citation was issued to Maria B. Moehring, as executrix of William G. Moehring, requiring her to show cause why she should not account for the property which came into her hands belonging to the estate of which her testator was executor, and why a decree should not be made, directing her to deliver it to the appellant as residuary legatee under the will of Sophie Moehring, deceased.

Subsequently, as such executrix, she presented a petition for a voluntary accounting in relation to the property in her hands belonging to that estate. Thereupon a citation was issued directed to all the persons interested in the estate to attend her judicial settlement as executrix of her testator. Upon a return of the citation first issued, the proceeding was adjourned until the return of the citation issued upon the

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second petition, when the two proceedings were merged and continued as one.

Sophie Moehring, who was a resident of the city of New York, died December 23, 1885, leaving a last will and testament which, after making certain specific bequests, contained the following residuary clause: "I give and bequeath to my youngest daughter, Marie Moehring, all the rest of my property, both real and personal, of whatever nature, my investments, bonds, etc., all my wearing apparel, my diamonds and all other jewelry belonging to me, absolutely during her lifetime, with the right to dispose of it at her death as she may deem fit."

This will was admitted to probate by the surrogate of the city and county of New York on the twenty-fifth of February, 1886, and letters testamentary were duly issued to William G. Moehring, the executor named therein, who thereupon entered upon the discharge of his duties as such. Marie Hill was the daughter of the testatrix, and was mentioned in the will as Marie Moehring.

The executor collected the assets, paid all the debts of the estate and all the legacies, except the residuary legacy to the appellant. On the eighteenth of July, 1892, he filed his account with the surrogate and petitioned for a judicial settlement thereof. Such proceedings were subsequently had that his account was finally settled by the surrogate December 10, 1892. The order or decree settling it adjudged, among other things, that the executor should retain in his hands the securities in which the residuary estate was invested which amounted to the sum of \$12,800. The securities were retained by the executor until his death, and the interest and income therefrom were paid to the appellant.

William G. Moehring died on the twentieth day of April, 1896, leaving a last will and testament, which was duly admitted to probate, and letters testamentary were issued thereon to Maria B. Moehring April 24, 1896. The portion of the estate of Sophie Moehring, which was unadministered at that time, came into her hands as such executrix. Since

the death of William G. Moehring no administrator, with the will annexed, or other representative of the estate of Sophie Moehring, has been appointed. After his death and up to the time of the trial, the income of that estate has been paid to the appellant by the executrix. The appellant demanded of her that she turn over to her all the securities in her hands belonging to the estate of Sophie Moehring, which she declined to do, upon the ground that she was not authorized to make such a transfer without the order of a court of competent jurisdiction.

Frederick E. Perham and Jacob Steinhardt for appellant. The petitioner, Marie Hill, is the absolute owner of the fund in the hands of Maria B. Moehring, as executrix, etc. (1 R. S. 732, 733, §§ 77, 79, 81, 83, 84; *Deegan v. Wade*, 144 N. Y. 573; *Hume v. Randall*, 141 N. Y. 499; *Cutting v. Cutting*, 86 N. Y. 522; *N. Y. L. Ins. & T. Co. v. Livingston*, 133 N. Y. 125; *Brown v. F. L. & T. Co.*, 51 Hun, 386; 117 N. Y. 266.) The surrogate should have directed that the accounting executrix pay over the fund now in her hands to the petitioner, Marie Hill. Ample authority for such a direction is found in section 2606 of the Code of Civil Procedure. (*In re Wiley*, 119 N. Y. 642; *Popham v. Spencer*, 4 Redf. 399; *Spencer v. Popham*, 5 Redf. 425; L. 1884, ch. 399; *Crauford v. Crauford*, 5 Dem. 37; *In re Coman*, 15 N. Y. S. R. 442; L. 1891, ch. 175; Code Civ. Pro. § 2514; *Pren-tiss v. Weatherly*, 52 N. Y. S. R. 80.) The order is properly appealable to this court. (Code Civ. Pro. §§ 190, 2550, 3333, 3334.)

William A. Woodworth for respondents.

MARTIN, J. The facts in this case are undisputed. The only question involved is whether the appellant was entitled to an order or decree directing the payment or transfer to her of the funds or securities in the hands of the executrix belonging to the estate of Sophie Moehring, deceased. That question depends for its solution upon two propositions: *First*,

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whether, under the will of Sophie Moehring, the appellant acquired an absolute title to the residuary estate, and, if so, *second*, whether the surrogate was required to make a decree directing the transfer and delivery of the property to her.

By her will Sophie Moehring bequeathed to the appellant for life the residue of her estate, with power to dispose of it at her death as she might deem fit. The power thus conferred was a general and beneficial one. It was an absolute power of disposition, and as no remainder was limited upon the property the grantee took an absolute title. (*Hume v. Randall*, 141 N. Y. 499; *Deegan v. Wade*, 144 N. Y. 573, 578.) The cases cited related to real estate and were based upon the provisions of the Revised Statutes as to powers. But the same principle applies to a grant or bequest of personal property. The rule of the common law was abrogated by the statute which abolished powers as they then existed. When the legislature adopted the Revised Statutes it intended to make the article with regard to powers a complete and exclusive code upon the subject, and that article is applicable as well to powers concerning personal property as to those affecting real estate. (*Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295; *N. Y. L. Ins. & T. Co. v. Livingston*, 133 N. Y. 125; *Mills v. Husson*, 140 N. Y. 99, 105; *Cochrane v. Schell*, 140 N. Y. 534.) Hence, it is obvious that the appellant took an absolute title to the residuary estate which was in the hands of the executrix of William G. Moehring when this proceeding was instituted.

Thus, we are brought to the consideration of the question of the appellant's remedy. She was entitled to the property, but whether in this proceeding it could be awarded to her is a more serious question. This proceeding was based upon the provisions of section 2606 of the Code of Civil Procedure. It is upon its provisions that the appellant exclusively relies for authority in the Surrogate's Court to make a decree transferring the property to her.

That section provides: "Where an executor * * * dies, the Surrogate's Court has the same jurisdiction, upon the peti-

tion of his successor, or of a surviving executor * * * or person interested in the estate, * * * to compel the executor * * * of the decedent to account, which it would have against the decedent if his letters had been revoked by a surrogate's decree. And an executor * * * of a deceased executor * * * may voluntarily account for any of the trust property which has come to his possession, and upon his petition such successor or surviving executor, administrator, * * * or other necessary party shall be cited and required to attend such settlement. * * * The Surrogate's Court has also jurisdiction to compel the executor * * * at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow each credit upon the decree as justice requires."

It is to be observed that the Surrogate's Court has the same jurisdiction to compel the executor to account which it would have against the decedent if his letters had been revoked by a surrogate's decree. When section 2603 of the Code is examined, it is found that, in such a case, the decree may, in the discretion of the surrogate, require the executor to account for all the money and other property received by him, and to pay it into the Surrogate's Court or to his successor in office, or to such other person as is authorized by law to receive the same. Reading the provisions of that section into section 2606, it appears that where an executor dies, the Surrogate's Court has jurisdiction to compel his executor to account for all money or property in his hands and to pay and deliver the same into the hands of the Surrogate's Court, or to his successor in office, or to such other person as is authorized by law to receive the same.

Hence, it seems to be discretionary with the surrogate whether he shall require an executor to account and pay and deliver the property in his hands to the Surrogate's Court, or to deliver it to his successor in office, or to such other person as is authorized by law to receive the same. In this case the surrogate, in the exercise of that discretion, directed the prop-

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erty to be paid into the Surrogate's Court, unless a representative of the estate of Sophie Moehring was appointed within sixty days from the granting of the decree. We think he was authorized to make the decree appealed from, and that there was no error in his refusing to direct the payment and delivery to the appellant of the money and property in the hands of the executrix.

It is perhaps unnecessary in this case to determine what effect should be given to the words, "or to such other person as is authorized by law to receive the same," contained in section 2603. That this provision was intended to confer upon the Surrogate's Court jurisdiction to direct an executor of an executor to distribute the estate of the testator of the latter among the persons entitled to it, is, to say the least, extremely doubtful.

Whatever may have been the common law upon the subject, we think in this state an executor of an executor is not authorized to administer the estate of the first testator. The Revised Statutes provided: "No executor of an executor, shall, as such, be authorized to administer on the estate of the first testator; but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, shall be issued in the manner and with the authority hereinafter provided." (2 R. S. part 2, ch. 6, tit. 2, art. 1, § 17.) Although this section was repealed by chapter 245 of the Laws of 1880, still the material part of its provisions was carried into and made a part of section 2643 of the Code of Civil Procedure. That section in effect provides that if, at any time by reason of death, there is no executor or administrator with the will annexed, qualified to act, the surrogate *must*, upon the application of a creditor of the deceased or a person interested in the estate, issue letters of administration with the will annexed. (See, also, section 2693.) Upon the death of an executor, it becomes the imperative duty of the surrogate, on the application of a person interested in the estate, to appoint a representative to administer the assets of the testator left unadmin-

istered. We think it is quite clear that the legislature intended to prohibit the executor of an executor from administering the assets of an estate which came into his hands, and that there is nothing in section 2606 which indicates a contrary purpose.

That the general purpose of that section was to call an executor of an executor to account for the money or property belonging to the first estate which comes into his hands, and to require him to pay and deliver it over to a legal representative of that estate, there can be little doubt. The provisions of that section are general, and obviously they were intended to apply to all cases where an executor dies leaving an estate wholly or partially unadministered, in whatever stage his administration may be when his death occurred. If, in a case like this, a surrogate is authorized to direct the executor of an executor to pay and deliver the property in his hands over to the legatees under the first will, it would seem to follow that he might authorize such an executor to perform any other acts of administration necessary to the settlement of an estate which came into his hands by the death of his immediate testator, and thus contravene the manifest intent and purpose of the provisions to which we have referred. We do not think the phrase, "such other person as is authorized by law to receive the same," includes legatees or creditors to whom the property will ultimately belong, but that this provision should be construed as relating to such other person as is authorized by law to receive it for the purpose of administration.

Obviously the main purpose of section 2606 is to authorize a surrogate, upon the application of a person interested in the estate, to take such action as may be necessary for its protection and preservation until it is placed in the hands of a legal representative for distribution and settlement. A legatee, devisee or creditor cannot be said to be authorized by law to receive such an estate in whole or in part until it is fully administered by a proper representative. Under this statute no one was authorized to receive this property except a legal representative of the estate. That portion of the estate which was unadministered could only be admin-

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istered by a representative of the first estate, and the appellant was entitled to the possession of her legacy only when, in the due course of the administration of that estate, it was paid or directed to be paid to her.

The appellant cites *Matter of Wiley* (119 N. Y. 642) and *Matter of Clark* (Id. 427) as sustaining her right to the decree which she sought. In those cases section 2606 was somewhat considered, and it was in substance held that that section conferred upon the surrogate jurisdiction upon the death of an executor to require his executor to account for and deliver over the trust estate precisely as if the letters of the deceased executor had been revoked in his lifetime and he had been called upon to deliver up the assets, and that his representative stands in his place for the purpose of such accounting and delivery. Those cases are not in conflict with the conclusion we have reached, but rather sustain it. That the executrix in this case might be required to deliver the property in her hands to the court or a representative of the principal estate is not and cannot be denied. But that she might be required to act as a representative of the first estate in distributing the unadministered assets is quite another thing and finds no sanction in the cases cited. The appellant was a person interested in the estate, and, therefore, entitled to inaugurate this proceeding. But that the surrogate was required to direct the executrix to deliver the property in her hands to the appellant without further administration we do not believe.

Therefore, we are of the opinion that, while the appellant holds the absolute title to the residuary estate under the provisions of the will of Sophie Moehring, yet she is not entitled to the possession of it until a representative of that estate is appointed, and that the Surrogate's Court was justified in declining to order its payment and delivery to her.

The order or decree appealed from should be affirmed, with costs to both parties, payable out of the funds.

All concur (VANN, J., upon the first two points, and O'BRIEN, J., in result).

Order affirmed.

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JOHN F. BAXTER, Respondent, v. CHARLES E. McDONNELL,
Appellant.

1. **APPEAL — CERTIFIED QUESTION.** While, on an appeal by certification, the Court of Appeals is confined to the question certified, it is its duty to ascertain all the facts that raise the question, so that it can be decided as an existing issue between the parties and the danger of passing upon merely abstract propositions avoided.

2. **DEMURRER TO ANSWER — SUFFICIENCY OF COMPLAINT.** The certified question whether the defense contained in the answer is insufficient in law upon the face thereof to constitute a defense, invokes the judgment of the Court of Appeals upon the law of the case as presented by the complaint and the answer, and requires an examination of the record to see whether the allegations of the complaint are sufficient to constitute a cause of action.

3. **COMPLAINT IN TWO COUNTS — GENERAL DEMURRER TO DEFENSE.** When the complaint contains two counts, and the defense demurred to is general, so that it applies to either, the demurrer must be examined upon the merits unless both counts are defective; but if neither count sets forth a cause of action, the sufficiency of the pleading demurred to cannot be considered.

4. **ARGUMENT ON SUFFICIENCY OF COMPLAINT.** Upon the certified question whether the defense contained in the answer is insufficient in law upon the face thereof to constitute a defense, the argument of counsel should include a discussion of the sufficiency of the complaint.

Reported below, 18 App. Div. 235, 629.

(Argued November 22, 1897; reargument ordered November 30, 1897.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1897, affirming an interlocutory judgment sustaining a demurrer interposed by the plaintiff to the defense set up in the answer.

The complaint contains two counts, which are preceded by certain general allegations doubtless intended to apply to both. These general allegations are, in substance, that the plaintiff, a priest of the Holy Roman Catholic Church, from September 10, 1885, until October 12, 1892, was pastor in charge of the parish of Babylon in the diocese of Brooklyn; that under the constitution, rules and ordinances of said church, all of

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the real and personal property thereof is held in the name of the bishop, individually, as trustee therefor; that by virtue of his trust it is the duty and agreement of the bishop to hold himself liable, individually, for all contracts for work, labor, services and materials furnished to the church; that the priests are appointed to posts of duty by the bishop, "and under the agreement with the bishop aforesaid made with the church as aforesaid," are authorized to hold him liable, individually, for their salaries, and they, in turn, are liable to account to him for any property or money received while performing duties under their assignments; that according to the rules it is the duty of the bishop to provide by will for the devolution of all property held by him, as such, to his successor.

After these general allegations "for a first cause of action," the plaintiff alleged that on September 10, 1885, the bishop then in charge of the diocese assigned him to the pastorate of the parish of Babylon; "that pursuant to the agreement made by and between the bishop," under the rules of the church, the plaintiff was authorized during his pastorate to receive all moneys paid by parishioners and accruing from the property of the parish, to use the same to pay the indebtedness of the parish and provide it with what was necessary, and retain for himself \$1,000 per annum as well as certain perquisites, and if the income of the parish was not enough to yield him a salary at that rate "the said bishop agreed to make up the difference himself;" that the bishop died December 30, 1891, leaving a will, since admitted to probate, whereby he gave to his successor all the property that he held for the church; that the defendant was installed as such successor in May, 1892, and shortly thereafter all the property so held in trust by his predecessor was transferred and handed over to him, and he accepted it "subject to the trusts and conditions upon which" the late bishop held the property, and upon such installation and acceptance he "did agree to pay * * * all debts incurred" by his predecessor and to carry out and consummate all contracts entered into by him in behalf of the church; that between the 10th of September, 1885, and the

12th of October, 1892, the plaintiff received from many sources on account of said parish \$25,741.50, and paid out on account thereof \$24,173.24; that the salary earned by him during said period amounted to \$7,166.66, "leaving a balance due and owing plaintiff on account of disbursements out of his said salary of \$5,598.40, no part of which has been paid except the sum of \$1,500;" that on the 30th of November, 1892, while in a weak condition of mind and body, he was overawed by the influence and pressure of the defendant and his advisers and induced by false promises and coerced by fraud, covin and duress into signing a general release, under seal, discharging the defendant from any and all claims on the part of the plaintiff.

"For a second cause of action" the plaintiff alleged that on December 4, 1892, he was assigned to duty by the defendant as chaplain of St. Mary's Hospital, in Brooklyn; that, since he has been acting as such chaplain, "he has received the sum of \$300 a year, making the aggregate to date about the sum of \$1,100;" "that, inasmuch as this plaintiff is a pastor, he should have received the sum of \$1,000 a year" or \$3,666.66 in all, and that the difference of \$2,566.66 is due and owing him from the defendant "as payment for salary during his * * * incumbency as chaplain of said hospital as aforesaid."

Judgment is demanded against the defendant for the sum of \$6,665.08, with interest on \$4,198.40 from November 12, 1892, and on \$2,566.66 from August 4, 1896, besides costs.

The defendant, by the first and second defenses set forth in his answer, admitted some allegations of the complaint and denied others. The third defense is as follows: "And, for a third separate and affirmative defense to the complaint of the plaintiff, this defendant alleges: That in an action in the Metropolitan Court of the archdiocese of New York, in which the plaintiff herein was plaintiff and this defendant was defendant, and in which all the matters of complaint alleged by the plaintiff in the complaint herein were alleged and set forth by said plaintiff in his action in said Metropolitan Court,

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and in which all the issues that are herein joined were therein tried, a judgment was duly rendered on or about the 25th day of August, 1895, whereby it was adjudged that: I. The decision of the court on the first complaint is that the resignation of the Rev. John F. Baxter, plaintiff, was valid. II. The decision of the court in the matter of the release and settlement is that the release signed by the plaintiff relinquishing all claims for the sum of fifteen hundred dollars (\$1,500), paid to him November 30, 1892, is binding on both parties to this suit, and must stand as valid. III. The court refuses to grant plaintiff's demand for a pastor's salary for the time he has served at St. Mary's Hospital. That the said Metropolitan Court of the archdiocese of New York is a court duly organized by the Holy Roman Catholic Church, and at the time said action was therein brought and tried, and said judgment was rendered, had jurisdiction of the parties to said action and of the subject-matter of said action, and that at the times said action was commenced, and continuously thereafter until the present, said plaintiff was, has been, and now is, a member of the Holy Roman Catholic Church, and subject to the rules, laws and discipline of said church, and subject to the jurisdiction and adjudication of said Metropolitan Court."

The plaintiff demurred to the third defense upon the ground "that the said third separate and affirmative defense of said answer does not set forth facts sufficient to constitute a legal defense."

The demurrer was sustained by the courts below and the defendant now comes to this court by permission of the Appellate Division.

Henry C. M. Ingraham and Joseph E. Owens for appellant.

L. J. Morrison for respondent.

VANN, J. The question certified by the learned Appellate Division to this court for determination is as follows: "Is the third separate and affirmative defense contained in the defend-

ant's answer herein insufficient in law upon the face thereof to constitute a defense?"

We have recently held that it is not the duty of this court to answer a question certified to it that will admit of one answer under one set of circumstances and a different answer under another, or where it presents only an abstract proposition, no facts being disclosed by the record to show that it arose in the case. (*Grannan v. Westchester Racing Association*, 153 N. Y. 449.) While we are confined to the question certified, it is our duty to examine the record not only to see that it actually arose, but also to see how it arose, so that we can decide it as it was presented to the courts below. In other words, we should ascertain all the facts that raise the question, so that it can be decided as an existing issue between the parties and the danger of passing upon merely abstract propositions may thus be avoided. The question, therefore, is not whether the facts alleged in the third division of the answer are insufficient to constitute a defense to a complaint that is admitted to set forth a good cause of action, but whether they constitute a defense to the cause of action purporting to be alleged in the complaint before us. The judgment of the court is thus invoked upon the law of the case as presented by the complaint and the third defense alleged in the answer. (*Lewis v. Cook*, 150 N. Y. 163, 165.)

The rule is that on demurrer to an answer for insufficiency the defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. (*People v. Booth*, 32 N. Y. 397; *Village of Little Falls v. Cobb*, 80 Hun, 20, 27; 6 Encyc. of Pl. & Pr. 326.)

A demurrer searches the record for the first fault in pleading and reaches back to condemn the first pleading that is defective in substance, because he who does not so plead as to invite an issue cannot compel his adversary to so plead as to accept it. (*Clark v. Poor*, 73 Hun, 143; *Williams v. Williams*, 25 Abb. N. C. 217; *Corning v. Roosevelt*, Id. 220, and cases cited in note.) As "a bad answer is good enough for a bad complaint," it is necessary to examine the record to

see whether the allegations of the complaint are sufficient to constitute a cause of action. The complaint contains two counts, and the defense in question is general so that it applies to either. Unless both counts are defective, the demurrer must be examined upon the merits, but if neither sets forth a cause of action, the sufficiency of the pleading demurred to cannot be considered. (*Wheeler v. Conn. Mut. Life Ins. Co.*, 82 N. Y. 543, 555; *Boyle v. City of Brooklyn*, 71 N. Y. 1.)

The Special Term assumed without discussion that the complaint states two causes of action, while the Appellate Division held that the first count was sufficient, but that the second was insufficient.

Upon the argument before us the sufficiency of the complaint was not discussed, doubtless upon the assumption that it was not involved in the question certified. In order to avoid the danger of doing injustice, we think that a reargument should be had, so that counsel may present their views upon that subject, and it is ordered accordingly.

GRAY, O'BRIEN, BARTLETT and MARTIN, JJ., concur; ANDREWS, Ch. J., and HAIGHT, J., not voting.

Reargument ordered.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MALCOM BREWING COMPANY, Respondent and Appellant, v. THE BOARD OF ASSESSORS OF THE CITY OF BROOKLYN, Appellant and Respondent.

TAX — REVIEW OF ASSESSMENT. When the only question raised under a writ of certiorari to review an alleged erroneous or unequal assessment is, in effect, whether there was sufficient in the evidence before the assessors to justify them in making the assessment at the figure in question, and a reassessment is ordered by the Special Term and its order is affirmed by the Appellate Division, it must be assumed that both those courts decided the question adversely; and as the ordering of a reassessment, on reaching such conclusion, is proper under the statute, it raises no question of law for review by the Court of Appeals.

People ex rel. Malcom Brewing Co. v. Neff, 19 App. Div. 596, affirmed.

(Argued November 22, 1897; decided November 30, 1897.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 3, 1897, which affirmed an order of Special Term vacating, on certiorari, an assessment against relator and directing the board of assessors of the city of Brooklyn to make a reassessment.

The facts, so far as material, are stated in the opinion.

Charles H. Otis for relator.

Joseph A. Burr for defendant.

Per Curiam. The relator was assessed upon its capital stock for the year 1896, by the board of assessors of the city of Brooklyn, at the sum of \$95,391.80, and, upon an application to have the assessment corrected, the board declined to make any alteration in the amount as fixed by it. A writ of certiorari was sued out by the relator, and, upon the review had at the Special Term thereunder, the assessment was vacated and the assessors were directed to make a reassessment, and that order has been affirmed by the Appellate Division. The grounds, as stated in the petition for the writ of certiorari, were, in substance, that the assessment was erroneous for overvaluation, and was unequal as to that part of its capital stock which consisted of real property, in that the assessment thereof made by the board was at a higher proportionate valuation than other real property in the same roll. The allegations of erroneous or unequal assessment were denied by the return, but the facts, as alleged in the petition, are not, in the main, controverted. The proceeding was brought to a hearing upon the writ and the return, and without the taking of any evidence by the court. The review had by the court, therefore, was upon the facts as they were made to appear before the assessors, in the sworn statements made by the officers of the relator and upon their oral examination. That evidence related to the items of the relator's book entries, as showing its assets and liabilities for a valuation of its capital

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stock. The controversy was over their correctness and the inferences which were drawn by the assessors. What was involved was a consideration of certain facts and a determination of conflicting inferences. The question was, in effect, whether there was sufficient in the evidence before the assessors to justify them in making the assessment at the figure in question, and that question both courts must be assumed to have decided adversely. Reaching such a conclusion, a reassessment was properly ordered under the statute.

We perceive no question of law for review by this court, and, therefore, no occasion to disturb the order of the Appellate Division.

The order appealed from should be affirmed, but, as there are cross-appeals, without costs to either party.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ISAAC PURDY, Appellant.

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1. TOWN SUPERVISOR — ELIGIBILITY TO OFFICE. The disqualification imposed by the Town Law (L. 1890, ch. 569, § 50), that "no trustee of a school district shall be eligible to the office of supervisor of any town or ward in this state," applies to the capacity of a candidate for election, as well as to the holding of the office.

2. ELIGIBILITY AT TIME OF ELECTION. The intention of the statute is that the electors, in making the choice of a person for the office of supervisor, must be confined to the selection of such persons only as are not then under any legal disqualification to exercise its powers and perform its duties.

3. RESIGNATION OF OFFICE OF TRUSTEE OF SCHOOL DISTRICT. As a trustee of a school district is incapable of being elected supervisor of a town, as well as of holding the office of supervisor, no right to that office is acquired by resigning the office of trustee after having received a majority of the votes cast for the office of supervisor at a town meeting, and before qualifying as supervisor.

People v. Purdy, 21 App. Div. 66, affirmed.

(Submitted November 22, 1897; decided November 30, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

October 9, 1897, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term and directed judgment for plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

John M. Digney and *Wilson Brown, Jr.*, for appellant. The respondent is entitled to a favorable construction of the statute in this case. (*People v. Flanagan*, 66 N. Y. 237.) The Latin derivation of the word "eligible," or the dictionary definition, will not control the broader construction given by the courts. (*State v. Smith*, 14 Wis. 497; *State v. Trumpf*, 50 Wis. 103; L. 1890, ch. 569, § 50; *State ex rel. v. Murray*, 28 Wis. 96, 99; *Smith v. Moore*, 90 Ind. 294; 5 Wait's Act. & Def. 1, § 1; *Searcy v. Grow*, 15 Cal. 117; *People ex rel. v. How*, 50 Miss. 626.) Not only was defendant's resignation conceded on the trial and in the conceded facts, but defendant resigned, as required by law, before he took or filed his oath as supervisor. (L. 1892, ch. 681.) The act of resignation was unnecessary. An office may be impliedly resigned or vacated by the incumbent being elected to and accepting an incompatible office. (1 Dillon on Mun. Corp. 308, 309, §§ 225, 227.) The provisions of section 33, title VII, of chapter 556 of the Laws of 1894 do not apply to any question except to that of penalties. (*People ex rel. v. Common Council of Brooklyn*, 77 N. Y. 503; *People ex rel. v. Nostrand*, 46 N. Y. 375; *People ex rel. v. Carrique*, 2 Hill, 93; *Van Orsdall v. Hazard*, 3 Hill, 243; *People ex rel. v. Conklin*, 7 Hun, 188.)

William H. Robertson, *Isaac N. Mills* and *Odle J. Whitlock* for respondent. The defendant, as a school trustee, was ineligible to the office of supervisor on the 31st of March, 1896, the date of the town election. (L. 1890, ch. 569, § 50; *People ex rel. v. Foley*, 148 N. Y. 677; L. 1894, ch. 556, § 22.) The defendant was ineligible not only to hold the office of supervisor, but even to be elected to that office, and,

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therefore, his election was illegal and void. (L. 1890, ch. 569, § 50; L. 1894, ch. 556, § 22; *People ex rel. v. Carrique*, 2 Hill, 93; *People ex rel. v. Nostrand*, 46 N. Y. 381; *People ex rel. v. Clute*, 50 N. Y. 467; *People ex rel. v. Common Council of Brooklyn*, 77 N. Y. 510; *Horton v. Parsons*, 37 Hun, 46; *People ex rel. v. Bd. of Police*, 35 Barb. 540; *People ex rel. v. Bd. of Police*, 35 Barb. 553; *People ex rel. v. State Bd. of Canvassers*, 129 N. Y. 360; L. 1896, ch. 909, § 66; *Karst v. Gane*, 136 N. Y. 321; *People ex rel. v. Wemple*, 115 N. Y. 307.) Mr. Norton is still entitled to the office of supervisor of the town of North Salem. (L. 1893, chs. 37, 344, § 12; L. 1890, ch. 569, § 65; *People ex rel. v. Randall*, 12 Misc. Rep. 619.) The judgment appealed from to the Appellate Division was properly reversed, with costs; and judgment absolute, in favor of the plaintiff, ousting the defendant from the office of supervisor, was properly directed and rendered. (*King v. Barnes*, 109 N. Y. 267; *Iselin v. Starin*, 144 N. Y. 460.)

O'BRIEN, J. In an action in the nature of a quo warranto, brought by the attorney-general against the defendant to oust him from the office of supervisor of the town of North Salem, the court below, reversing the judgment of the trial court, held that the defendant was not entitled to the office. It is undisputed that, at the town meeting held in March, 1896, the defendant received the largest number of votes cast by the electors, and if they could lawfully choose him to discharge the duties of the office, he was clearly elected.

On the day upon which the town meeting was held and the votes cast, the defendant held the office of trustee of one of the school districts of the town, but after the result of the election was declared, he resigned that office, qualified as supervisor and entered upon the discharge of the duties of that office.

Section fifty of the Town Law enacts that no trustee of a school district shall be eligible to the office of supervisor of any town or ward in this state. The trial court held that this

disqualification related to the holding of the office and not to the election. That while the defendant was ineligible to hold the office of supervisor, until his resignation of the office of school trustee, yet he was capable of receiving the votes of the electors and of being elected to the office at the town meeting, and that his subsequent resignation of the office of trustee removed every objection to his right to enter upon the duties of supervisor and hold that office. The appeal, therefore, presents the question with respect to the meaning and proper construction to be given to the disqualifying words of the statute. This question has been so thoroughly and ably discussed in the learned opinion below, and the conclusion that a school trustee is not only incapable of holding the office of supervisor, but also of being elected to that office, is so well supported by the reasoning based upon the ordinary meaning of the word *eligible* and the general current of judicial authority, that very little remains to be said upon the subject. The opinion covers the whole ground, and the result, it will be seen, is well sustained by reason and authority.

We have but one suggestion to add to what has been there so well stated. A public statute relating to the qualifications of public officers should never be so construed as to produce inconvenience or to promote a public mischief or to render the action of the voters at the election abortive. It should, in every case when the language will fairly permit, be given such a construction as to enable the electors to act intelligently, and to accomplish with as much certainty as practicable the purpose that they may have in view. If it be held that the disqualification of the statute applies only to the holding of the office, and not to the capacity of the candidate for election, then the electors can never know when voting for a school trustee for the office of supervisor, whether they will succeed in filling the office or not. Though the action of the electors may be unanimous, the result must depend upon the future action of the candidate himself. Unless he resigns as trustee, there has practically been no election, and the office is left vacant, though the people intended to fill it. The vote in such a case

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may be said to be conditional upon the resignation of another office by the candidate voted for. He may refuse or fail to resign, and then the action of the voters is nugatory. The statutes for filling vacancies might not apply to such a case since it cannot be said that the person who received the votes of the people ever filled the office or could fill it. It is simply a failure to elect any one to the place.

The statute, we think, does not contemplate that a person who is disqualified to hold the office may, nevertheless, be lawfully elected upon the chance that subsequently he may, by his own act, or by the happening of some event, remove the disqualification, and thus become entitled to fill it. The better rule is that the electors, in making the choice, must be confined to the selection of such persons only as are not then under any legal disqualification to exercise its powers and perform its duties. The electors can then know that when the choice is made and legally declared the object for which the election was held has been accomplished, and that there is no legal obstruction in the way to prevent their will, as thus expressed, from becoming effective.

The judgment was right and must be affirmed.

All concur.

Judgment affirmed.

In the Matter of the Final Accounting of JOHN CLOVER, as Assignee of STEPHEN T. MILLER and CHARLES M. ALLEN, for the Benefit of Creditors.

CHARLES H. ZIMMER, as Receiver, Appellant; CHARLES A. MILLER, Respondent.

TITLE TO PERSONAL PROPERTY, AS BETWEEN PURCHASER AND RECEIVER IN SUPPLEMENTARY PROCEEDINGS — PAST-DUE NOTES — CODE CIV. PRO. § 2469. In determining whether the purchaser of promissory notes of a third party from a judgment debtor has a title, to the extent of the purchase money, which is protected from subjection, by relation, to the title of a receiver in supplementary proceedings, by the statutory provision which exempts from such subjection the title of a purchaser of personal property "in good faith, without notice and for a valuable consideration"

(Code Civ. Pro., § 2469, subd. 4), the fact that the notes were past due is at most only a circumstance which may be considered as bearing upon the question of good faith, and the rule of the law merchant on the subject is not controlling.

Matter of Clover, 8 App. Div. 556, affirmed.

(Submitted November 23, 1897; decided November 30, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 11, 1896, which affirmed a decree made by the Lewis County Court.

This proceeding was instituted to compel the assignee for the benefit of the creditors of the firm of Miller & Allen to render and settle his account. The petition was by the appellant, as receiver of the property of John P. Zimmer, who was a creditor of the firm. Upon the hearing, a contest arose between the appellant and the respondent as to the title to certain notes given by the firm of Miller & Allen to John P. Zimmer which amounted to the sum of about fifteen hundred dollars. The respondent claimed title as a purchaser from John P. Zimmer, while the appellant claimed title as receiver in supplementary proceedings upon a judgment against him.

June fifteenth, 1889, the firm of Miller & Allen, as copartners and as individuals, executed and delivered general assignments for the benefit of their creditors to John Clover, as assignee, who thereupon duly qualified and entered upon the discharge of his duties as such. At the time the assignors were indebted to Zimmer in the sum of about fifteen hundred dollars, which was secured by the notes in question.

On August second, 1889, a judgment existed against him, upon which an execution had been returned wholly unsatisfied. On that day the judgment creditor therein obtained an order in supplementary proceedings against him and to examine third parties, which was directed to the debtor, the members of the firm of Miller & Allen, and the assignee of that firm. The order contained a clause forbidding the debtor from making any transfer or other disposition of his property, and forbidding the third persons named therein from

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paying or from in any way interfering therewith. On the next day the order was personally served upon the judgment debtor, both members of the firm and the assignee. At that time the debtor was the owner and holder of the promissory notes mentioned. On the following Monday, August fifth, he appeared in the city of New York, and sold them to the respondent for the sum of \$924.24, who, at that time, had no information in regard to them, except that he had seen them mentioned in the list of creditors of Miller & Allen. When he purchased them he had no knowledge of the proceedings supplementary to execution. They were purchased at the request of the firm of Miller & Allen and paid for by the respondent from his own funds. He afterwards purchased from different creditors of that firm all the other claims against it, amounting to upwards of twelve thousand dollars, which were also purchased at the request of Miller & Allen.

Immediately after the delivery of the notes to the respondent the debtor absconded, and has not since been within the state. He did not appear in the proceedings supplementary to execution, but they were continued and, on the seventeenth day of October, 1889, the appellant was appointed receiver of his property. The order appointing him was recorded in Lewis county on the same day. On the twenty-second of that month he gave a bond as required by the order, which was approved by the county judge, and filed in the office of the clerk of that county. The amount of the judgment upon which the supplementary proceedings were instituted exceeded the amount of the notes against Miller & Allen.

Upon the facts as found, the County Court held that, when the respondent purchased the notes, he took a good title thereto as security for the sum of \$924.24 advanced therefor, and had a lien thereon for that sum; that he was entitled to enforce them for that amount and interest from August 5th, 1889, and that the appellant was only entitled to the remainder of the moneys secured by the notes after the payment of that sum to the respondent. A decree was entered accordingly.

The receiver appealed to the Appellate Division from so much of the decree as awarded to the respondent the amount paid by him for the notes or debt in question.

S. M. Lindsley and Jay A. Pease for appellant. Zimmer could convey no title to the notes after the order in supplementary proceedings was served, August 3, 1889. The legal title thereto is in the receiver as of that date. (Code Civ. Pro. §§ 2468, 2469; *McCorkle v. Herrman*, 117 N. Y. 297.) Charles A. Miller was not such purchaser in good faith and without notice that his title is unaffected by the prior title of the receiver. (*Morss v. Gleason*, 2 Hun, 36; 64 N. Y. 204; *Angle v. N. W. M. L. Ins. Co.*, 92 U. S. 341; *Hawley v. Cramer*, 4 Cow. 718; *Cheever v. P., S. & L. E. R. R. Co.*, 150 N. Y. 59.) By the law merchant, a purchaser takes overdue commercial paper at his own risk, subject to all equities attaching thereto. (*Geyer v. Brewster*, 19 N. Y. S. R. 351; *Chester v. Dorr*, 41 N. Y. 279; *Cheever v. P., S. & L. E. R. R. Co.*, 150 N. Y. 59; *C. Nat. Bank v. Diefendorf*, 123 N. Y. 202; *McCorkle v. Herrman*, 117 N. Y. 297.) The fact that the paper was over due charged Miller with notice, and put him upon inquiry as to what, if any, defenses, liens or equities existed. (*Hawley v. Cramer*, 4 Cow. 722; *Dunn v. Hornbeck*, 72 N. Y. 89; *Gross v. Kellard*, 56 N. Y. S. R. 617; *Ellis v. Horrman*, 90 N. Y. 473; *Owen v. Evans*, 134 N. Y. 514.)

Walter Ballou for respondent. The court cannot review the facts in this case as the testimony is not given. (*Graff v. Ross*, 47 Hun, 152.) Charles A. Miller bought the notes in question in good faith for a valuable consideration and without notice of supplementary proceedings and so obtained good title as against the receiver. (Code Civ. Pro. § 2469, subd. 4; *Merry v. Wilcox*, 92 Hun, 210.)

MARTIN, J. The controversy in this case arises between different claimants of a debt owing by the assignors to one of

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their creditors. The single question involved upon this appeal is, whether the respondent was a purchaser in good faith of the claim of the judgment debtor against Miller & Allen within the provisions of subdivision four of section 2469 of the Code of Civil Procedure. The appellant was not appointed receiver until the seventeenth day of October, 1889, while the notes were purchased by the respondent on the fifth day of the preceding August. The section of the Code referred to provides that where the receiver's title to personal property has become vested, as prescribed in section 2468, it extends back by relation for the benefit of the judgment creditor, so as to include the personal property of the judgment debtor at the time of the service of the order, but does not affect the title of a purchaser in good faith without notice and for a valuable consideration.

In this case it was proved by undisputed evidence that the respondent purchased the notes or claim in question in good faith, without any notice of the proceedings in which the appellant was appointed receiver, and that he paid a valuable consideration therefor. The trial court held that, to the extent of the consideration paid, he was a purchaser in good faith and entitled to have that amount paid to him from the assets of the insolvent firm.

The contention of the appellant, however, is that the respondent was not a purchaser in good faith without notice for the sole reason that the notes, except one for one hundred dollars, were past due when he purchased them, and that that fact is conclusive evidence that he was not such a purchaser. There was no evidence of bad faith or of notice, and that he paid a valuable consideration stands uncontradicted. Therefore, the question is narrowed to this: Is the rule in regard to a purchaser in good faith of commercial paper, with its exceptions and limitations, controlling in this case? One of the limitations of that rule is that, if the transfer is after the maturity of the paper, the purchaser takes it as dishonored, and is affected by such equities between the parties as were attached to it. It is to be remembered that the issue in this

case is not between the parties to the notes, but relates only to a sale of choses in action to a third person by the holder and apparent owner. It was an independent and collateral contract, and the only relation it had to the notes was that they were the subject of the sale. If the makers of the notes were contesting their liability thereon, another question would be presented, and that rule might apply. But, in determining whether the respondent had a title which was protected by the statute, the fact that most of the notes were past due could, at most, be only a circumstance which might, perhaps, be considered as bearing upon the question of the good faith of his purchase. We think it is quite obvious that the rule which is invoked by the appellant is not controlling here.

The question in this case is dependent upon and involves the construction and application of a statute which, in substance, provides that the title of a receiver appointed in supplementary proceedings shall not relate back to the time of his appointment so as to affect the title of a purchaser in good faith. Hence, the proper inquiry is, not whether the respondent acquired a good title under the law merchant, but whether he was such a purchaser as this particular statute protects.

The respondent purchased of the judgment debtor certain notes against an apparently insolvent firm, of which his brother was a member, and which had made a general assignment for the benefit of its creditors. The purchase was in pursuance of a request of the members of the firm, and was obviously to assist them in the adjustment of their financial difficulties. The respondent at the time had no notice of the supplementary proceedings, or of any other fact that would impeach or affect the title of the payee, or that would naturally provoke inquiry or excite any suspicion as to his right to dispose of them. He paid the same consideration proportionately that he subsequently paid for the remaining debts of the firm. It is true that all of the notes purchased, except one, were past due, yet that fact was in no way inconsistent with a good title in the holder, or with his right to transfer them. It was a situ-

ation reasonably to be expected under the circumstances, as the firm had already suspended payment and made a general assignment for the benefit of its creditors. The fact that most of the notes had previously matured would not naturally have indicated that the holder was not the owner, nor would it have suggested that any proceeding was pending against him which would affect his title. There was no evidence or circumstance which tended to show that the respondent knew or even suspected that the holder was embarrassed or in debt. If the claim had been in the form of an account, then it seems to be admitted that the purchaser would have been protected to the extent of the consideration paid. We do not think the fact that the debt was secured by notes, most of which were due, was sufficient to charge the respondent with bad faith, or with notice. Moreover, whether the respondent was a purchaser in good faith, without notice and for a valuable consideration, was, at least, a question of fact, and the determination of the trial court was justified by the proof.

The decision in this case was clearly right, and the judgment should be affirmed.

All concur.

Judgment affirmed, with costs.

WILLIAM MATTHEWS, as Executor of CAROLINE SILVERNAIL,
Deceased, Appellant, v. AMERICAN CENTRAL INSURANCE
COMPANY, Respondent.

154	449
160	601
j 160	603
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164	510
154	449
171	85

1. FIRE INSURANCE — LOSS AFTER DEATH OF ORIGINAL INSURED — NOTICE AND PROOFS OF LOSS. A policy of fire insurance which provides that the "insured" shall give "immediate notice of any loss," and "within sixty days after the fire" shall furnish proofs of loss "signed and sworn to by said insured," and that the word "insured" shall "be held to include the legal representatives of the insured," is to be considered in the light of what may reasonably be presumed to have been within the contemplation of the parties, as to the possibility of literal performance in case of a fire occurring after the death of the original insured and before any opportunity to have a legal representative appointed by the surrogate.

2. **LITERAL COMPLIANCE WITH POLICY IMPOSSIBLE — LEGAL REPRESENTATIVES OF INSURED.** Where literal compliance with the provisions of the policy as to giving notice and furnishing proofs of loss is impossible for the reason that no legal representative of the deceased insured had been appointed by the surrogate at the time of the fire, it is incumbent upon those interested in the policy to make reasonable efforts to see that the covenants are kept and, within a reasonable time, to use such agencies as the law provides, in order that they may be kept, if possible.

3. **NON-APPOINTMENT OF EXECUTOR — TEMPORARY ADMINISTRATOR.** Inability to procure the appointment of an executor of the original insured with ordinary promptness, by reason of a contest over the will, does not excuse delay in giving notice, furnishing proofs of loss, and commencing suit upon the policy, where those interested in the policy made no effort to obtain the appointment of a temporary administrator.

4. **POWERS OF TEMPORARY ADMINISTRATOR.** A fire insurance policy, after a loss has occurred, is a chose in action, and a temporary administrator can collect the same and, if necessary, commence an action for that purpose (Code Civ. Pro. § 2672); and this right to collect carries with it the right to serve all such notices as the policy required, in order to make it collectible.

5. **LEGAL REPRESENTATIVES OF INSURED.** The assumption that the "legal representatives of the insured," referred to in the policy, included the heirs at law, next of kin, legatees and devisees, as the case may be, affords no support to a late action upon the policy, brought by an executor whose appointment had been delayed, for a loss which occurred after the death of the original insured, in the absence of timely service of notice and proofs of loss, where it appears that upon that theory there was no time when competent persons, sustaining one or more of those relations to the decedent, with full knowledge of all the facts, could not have given the notice and furnished the proofs of loss.

6. **LATE ACTION UPON POLICY.** Evidence that notice and proof of a loss which occurred after the death of the original insured were given as required by the policy will not support an action on the policy by an executor whose appointment was delayed by a contest over the will, when the action was not begun until after the time limited for that purpose by the policy had elapsed, and no lawful reason is given for not procuring temporary administration in time to have sued within the stipulated period.

7. **OBSTACLES TO PERFORMANCE OF CONDITIONS PRECEDENT TO RECOVERY UPON POLICY.** If there are obstacles to the performance of conditions precedent to a recovery upon an insurance policy, the party interested in the policy must make a reasonable effort to remove them. If, after due diligence, they have proved insurmountable for a time, the delay will be excusable, and performance at the earliest practicable moment thereafter will be sufficient; but to excuse non-performance it must appear that the act to be done could not, by any reasonable means, have been accomplished.

8. FAILURE OF ACTION UPON POLICY. An action to recover upon a fire insurance policy, for a loss which occurred after the death of the original insured, commenced after the lapse of the time limited for that purpose by the policy, by an executor of the original insured, whose appointment had been delayed by a contest over the will, cannot prevail, when it appears that the failure to apply for a temporary administrator and to endeavor through him to give the notices required by the policy and essential to perfect the cause of action, and then to have suit brought therefor within the period stipulated, was absolute and without excuse.

9. EXCEPTIONS HEARD BY APPELLATE DIVISION IN FIRST INSTANCE. The Appellate Division of the Supreme Court is not authorized to dismiss the complaint upon the merits, upon a motion for a new trial upon exceptions ordered to be heard by it in the first instance, under section 1000 of the Code of Civil Procedure.

Matthews v. American Central Ins. Co., 9 App. Div. 339, modified.

(Submitted October 22, 1897; decided December 7, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 30, 1896, sustaining exceptions ordered to be heard by that court in the first instance and dismissing the complaint upon the merits.

On the first of August, 1889, the defendant issued its policy of insurance of the standard form to Mrs. Caroline Silvernail whereby it insured her dwelling house, barn and the produce therein against loss or damage by fire to an amount not exceeding \$1,050 for the term of three years from that day. On the second of December, 1891, Mrs. Silvernail died, leaving a will in which the plaintiff was nominated as sole executor. The probate of her will was opposed by some of her heirs, and on the 20th of April, 1892, when the contest was still in progress before the surrogate, a fire occurred, which destroyed a portion of the property insured, both real and personal. On the 15th of May, 1894, the contest over the will resulted in its admission to probate and the appointment of the plaintiff as executor. July 11th, 1894, proofs of loss were sworn to by the plaintiff and shortly thereafter mailed to the defendant, which received them at the home office in St. Louis, July 23, 1894, and retained them without objection. The loss not

having been paid, on the 29th of October following this suit was commenced upon the policy. The defendant pleaded as defenses that the action was not begun within twelve months next after the fire, although there was a limitation by contract to that period, that written notice of the loss was not immediately given, and that proofs of loss were not furnished within sixty days after the fire, as required by the policy.

Upon the trial, after the defendant's counsel had expressly stated that he did not ask to have any question submitted to the jury, the court, upon motion of the plaintiff, directed a verdict in his favor for the sum of \$612, the admitted value of the property destroyed, with interest from the 23d of September, 1894, and ordered that the defendant's exceptions should be heard by the Appellate Division in the first instance, and that entry of judgment should, in the meantime, be suspended. The Appellate Division having, by a divided vote, sustained the exceptions and dismissed the complaint, the plaintiff appealed to this court.

J. F. Parkhurst for appellant. The one-year limitation in the policy did not commence to run until the appointment of plaintiff as executor. (*Wenman v. M. Ins. Co.*, 13 Wend. 268; *Bucklin v. Ford*, 5 Barb. 393; *Sanford v. Sanford*, 62 N. Y. 553; *Richards v. M. Ins. Co.*, 8 Cranch, 84; *Dunning v. O. Nat. Bank*, 6 Lans. 296; *Pendleton v. Pendleton*, 6 Bush [Ky.], 469; *Ward v. West*, 38 Ark. 243; *Benjamin v. De Groot*, 1 Den. 156; Code Civ. Pro. § 415; Angell on Lim. §§ 54-63, 144; *Mayor v. H. F. Ins. Co.*, 39 N. Y. 46; *Murray v. E. I. Co.*, 5 B. & A. 204; *Braun v. Sauerwein*, 10 Wall. 218; *Hobart v. C. T. Co.*, 15 Conn. 145; *Steen v. N. F. Ins. Co.*, 89 N. Y. 323; *Hay v. S. F. Ins. Co.*, 77 N. Y. 235.) Conditions of the policy as to proof and procedure after loss are entitled to a liberal and reasonable construction in favor of the insured. (*McNally v. P. Ins. Co.*, 137 N. Y. 398; *Trippe v. P. F. Soc.*, 140 N. Y. 26; *Ins. Co. v. Boykin*, 12 Wall. 433; *Paltrovitch v. P. Ins. Co.*, 143 N. Y. 75; *Bumstead v. D. M. Ins. Co.*, 12 N. Y. 92; *McLaughlin v.*

W. C. M. Ins. Co., 23 Wend. 525; *Hoffman v. A. F. Ins. Co.*, 1 Robt. 501; *Norton v. R. & S. Ins. Co.*, 7 Cow. 649; *Dexter v. Norton*, 47 N. Y. 65; *C., etc., R. Co., v. Hoyt*, 149 U. S. 1.) The plaintiff was not bound to apply for the appointment of a temporary administrator to bring this action. (*Hall v. Brennan*, 64 Hun, 397; 140 N. Y. 409; *Hayden v. Pierce*, 144 N. Y. 519; *McGregor v. Buel*, 24 N. Y. 166; Redfield on Sur. Prac. 334; *In re Chase*, 32 Hun, 320; Code Civ. Pro. § 2670; *Sanford v. Sanford*, 62 N. Y. 554; *Richards v. M. Ins. Co.*, 8 Cranch, 84; *Bucklin v. Ford*, 5 Barb. 393; Angell on Lim. 61; *Sheldon v. Heaton*, 88 Hun, 538; *Sebay v. Abithol*, 4 M. & S. 462; *Lux v. Huggin*, 69 Cal. 255; *Smith v. Duncan*, 16 N. J. Eq. 240.) The general provisions of the Code governing the Statutes of Limitations apply also to limitations by contract. (*Hayden v. Pierce*, 144 N. Y. 512; *Titus v. Poole*, 145 N. Y. 425; *Gee v. Torrey*, 77 Hun, 23; Code Civ. Pro. § 415; *Hay v. S. F. Ins. Co.*, 77 N. Y. 235; *Hoffman v. A. Ins. Co.*, 32 N. Y. 415.) The direction by the trial court of a verdict for the plaintiff was proper, upon the the evidence. (*Kenyon v. Kenyon*, 88 Hun, 211; *Rider v. Miller*, 86 N. Y. 507; *Gordon v. People*, 33 N. Y. 501; *Schwier v. N. Y. C. & H. R. R. Co.*, 90 N. Y. 558; *Byrne v. B., C. & N. R. R.*, 58 N. Y. S. R. 128; *Riley v. Riley*, 141 N. Y. 409.)

I. N. Ames for respondent. The plaintiff is not entitled to maintain this action and the motion for a nonsuit should have been granted by the trial court and the complaint was properly dismissed by the Appellate Division. (*I. F. Ins. Co. v. Coos County*, 151 U. S. 452; *Riddlesbarger v. H. Ins. Co.*, 7 Wall. 386; *Wilkinson v. F. N. F. Ins. Co.*, 72 N. Y. 499; *Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543; *Wilson v. A. Ins. Co.*, 27 Vt. 99; *W. M. L. Ins. Co. v. Conner*, 98 Penn. St. 384.) Under the policy it is provided where the word "insured" occurs, it shall be held to include the legal representative of the insured. And the condition that no action can be sustained by the insured

or her legal representative unless commenced within twelve months next after the fire is a condition precedent which has not been performed or waived in the case at bar, hence there can be no recovery. (*King v. W. F. Ins. Co.*, 47 Hun, 1; *People v. A. S. B. Ins. Co.*, 69 N. Y. S. R. 721; *Ripley v. A. Ins. Co.*, 30 N. Y. 163; *Wilkinson v. F. N. F. Ins. Co.*, 72 N. Y. 499; *Wheeler v. C. L. M. Ins. Co.*, 82 N. Y. 543; *Tasker v. K. Ins. Co.*, 58 N. H. 469; *Riddlesbarger v. Ins. Co.*, 7 Wall. 386; *Quinn v. R. Ins. Co.*, 62 N. Y. S. R. 738; *Better v. P. Ins. Co.*, 32 N. Y. S. R. 686; *Chambers v. A. Ins. Co.*, 51 Conn. 17; *Bradley v. P. Ins. Co.*, 28 Mo. App. 7.) Under the wording of the New York standard policy the short contractual twelve months' limitation commences to run from the day of the fire, not from the time the loss matures or becomes due and payable. (*King v. W. F. Ins. Co.*, 47 Hun, 1; *Quinn v. R. Ins. Co.*, 62 N. Y. S. R. 738; *People v. A. S. B. Ins. Co.*, 69 N. Y. S. R. 721; *Chambers v. A. Ins. Co.*, 51 Conn. 17; *Bradley v. P. Ins. Co.*, 28 Mo. App. 7; *Johnson v. H. Ins. Co.*, 91 Ill. 92; *Carraway v. M. Ins. Co.*, 31 La. Ann. 298; *Proska v. McCormick*, 56 Iowa, 318; 132 N. Y. 334.) By the policy time is made the essence of the contract. (*Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543.) The fact that there was a contest over the probate of the will which lasted two or three years is no excuse. (Bliss' Code, § 2688; Redfield on Surr. Prac. [2d ed.] 345; *Wilkinson v. F. N. F. Ins. Co.*, 72 N. Y. 499; *Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543; *Riddlesbarger v. H. Ins. Co.*, 7 Wall. 386; *Beebe v. Johnson*, 19 Wend. 500; *Wilson v. A. Ins. Co.*, 27 Vt. 99; *Better v. P. Ins. Co.*, 32 N. Y. S. R. 686; *Elliot v. M. B. Assn.*, 59 N. Y. S. R. 139.) The general Statute of Limitation prescribed by law or the Code has no application to a limitation stipulated by contract. (*Wilkinson v. F. N. F. Ins. Co.*, 72 N. Y. 499; *Riddlesbarger v. H. Ins. Co.*, 7 Wall. 386; *Better v. P. Ins. Co.*, 32 N. Y. S. R. 686; *Quinn v. R. Ins. Co.*, 62 N. Y. S. R. 738; *People v. A. S. B. Ins. Co.*, 69 N. Y. S. R. 721; *Tasker v. K. Ins. Co.*, 58 N. H. 469; *Proska v. McCormick*, 56 Iowa,

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Points of counsel.

318.) The learned trial court intimated that the death of the assured was an act of God that excused the commencement of the action until the will was probated. This was error. (*Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543; *Dexter v. Norton*, 47 N. Y. 62; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272; *Beebe v. Johnson*, 19 Wend. 500; *Ward v. H. R. B. Co.*, 125 N. Y. 230; *Booth v. S. D. R. M. Co.*, 60 N. Y. 487; *School Dist. v. Dauchy*, 25 Conn. 530; *Wolfe v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40.) The non-performance of a contract is not excused by the act of God, when it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible. (*Williams v. Vanderbilt*, 28 N. Y. 217; *Beebe v. Johnson*, 19 Wend. 500; *Blacksmith v. Fellows*, 7 N. Y. 401; *Norton v. Woodruff*, 2 N. Y. 153; *Tompkins v. Dudley*, 25 N. Y. 272; *Harmony v. Bingham*, 12 N. Y. 99; *Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543.) To excuse non-performance it must appear that the thing to be done cannot by any means be accomplished; mere difficulty of performance is not enough and it is not a proper case for a court of equity to interfere and grant relief. (*Wheeler v. C. M. L. Ins. Co.*, 82 N. Y. 543.) There is no evidence in this case that establishes a waiver or creates an estoppel. (*Walsh v. H. F. Ins. Co.*, 73 N. Y. 5; *Marvin v. U. L. Ins. Co.*, 85 N. Y. 278; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Allen v. G. A. Ins. Co.*, 123 N. Y. 6; *Messelback v. Norman*, 122 N. Y. 578; *Baumgartel v. P. W. Ins. Co.*, 136 N. Y. 547; *Hill v. L. A. Corp.*, 30 N. Y. S. R. 539; *Walton v. A. Ins. Co.*, 116 N. Y. 317; *Walker v. P. Ins. Co.*, 69 N. Y. S. R. 817; *Kyle v. C. A. Co.*, 144 Mass. 43; *W. M. F. Ins. Co. v. Conner*, 98 Penn. St. 384; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219.) If the short contractual limitation in the policy is not wholly a matter of contract it does not help the plaintiff, as the general Statute of Limitation would not apply. (*Quinn v. R. Ins. Co.*, 62 N. Y. S. R. 738; 81 Hun, 207; *Hill v. Supervisors*, 119 N. Y. 344; *Dunham v. Sage*, 7 Laus. 419.)

VANN, J. The policy in question provided that if a fire should occur "the insured" should "give immediate notice of any loss thereby in writing to" the company, and "within sixty days after the fire" should furnish proofs of loss "signed and sworn to by said insured." It further provided that the loss should not become payable until sixty days after the receipt by the company of the proofs of loss, and that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." By a subsequent clause it was stipulated that whenever the word "insured" occurred in the policy it should "be held to include the legal representatives of the insured," and by a preceding clause that any change in interest, title or possession, "other than by death of the insured," should avoid the policy.

As the fire occurred after the death of Mrs. Silvernail, "the insured" at the date of the loss was either the person who, in the course of time, should be appointed by the surrogate to administer upon her estate, or the persons interested in her estate who expected to share therein. (13 Am. & Eng. Ency. of Law, 221; 21 id. 18; *Greenwood v. Holbrook*, 111 N. Y. 465.) As "legal representatives" are equivalent to "executors and administrators," where the subject-matter or context do not control the meaning, we will first proceed upon the assumption that, on the death of the testatrix, the words "the insured," as used in the policy, referred to the legal representative to be appointed by the surrogate. That person could not, in the nature of things, be known until the appointment was actually made, as, in the case of testacy, the executor nominated might die or decline, and, in case of intestacy, none of the persons entitled to the right of administration might accept the trust. The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view, and hence, when the meaning is doubtful, it should be construed most favorably to

the insured, who had nothing to do with the preparation thereof. (*Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 313; L. 1886, ch. 488; L. 1892, ch. 690, § 121.)

Moreover, when a literal construction would lead to manifest injustice to the insured and a liberal but still reasonable construction would prevent injustice by not requiring an impossibility, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable and not an unreasonable result. (*Trippe v. Provident Fund Society*, 140 N. Y. 23, 26; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.) Hence, it cannot be held that the policy became of no value upon the death of Mrs. Silvernail, because, at that moment she had, and of necessity, could have, no legal representative to give immediate notice of a fire if one had occurred. So, when the fire actually occurred there was still no legal representative to give the notice specified, yet the liberal construction that always obtains with reference to the procedure after a loss, does not permit us to hold that the policy became void because, under the circumstances then existing, the notice was not given at once. (*Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 76.) As the policy provides for the effect of death, and includes, under the head of "the insured," the legal representative of the insured, the parties necessarily contemplated a period longer or shorter in duration, depending upon circumstances, when there could be no one authorized to act for the estate. Hence, the covenants that "the insured" should give written notice immediately after the fire, and that within sixty days "the insured" should sign, swear to and deliver proofs of loss, are to be considered in the light of what may reasonably be presumed to have been within the contemplation of the parties when they entered into those covenants, as to the possibility of literal performance in case of a fire after the death of the original "insured" and before any opportunity to have a legal representative appointed by the surrogate. The words "immediately after the fire," as used with reference to the preliminary notice, and "sixty days after the fire," as used

with reference to the proofs of loss, are to be construed, not literally in all cases, but in the light of what was reasonable and possible in the case in hand. (*Bennett v. Lycoming C. M. Ins. Co.*, 67 N. Y. 274; *Richards on Insurance*, § 160.) The law does not require impossibilities. The disability to sue, caused by war, has been held to relieve a policyholder from the consequences of failing to bring suit within twelve months after a loss, as required by the policy, because compliance was impossible under the circumstances. (*Semmes v. Hartford Ins. Co.*, 13 Wall. 158.) The same cause was held for the same reason to legally excuse the non-payment of premiums upon a policy of life insurance as required by its terms. (*Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610.) Still, as the covenants in question are essential to the safe conduct of the insurance business, in order to enable the insurer to promptly investigate the facts connected with a fire, to provide for paying or defending, or for rebuilding, if it so elected, it is incumbent upon those interested in the policy to make reasonable efforts to see that the covenants are kept and, within a reasonable time, to use such agencies as the law provides, in order that they may be kept, if possible. As was said by this court in *Wheeler v. Conn. Mut. Life Ins. Co.* (82 N. Y. 543, 550), with reference to the failure to pay premiums of life insurance owing to the insanity of the insured and the infancy of the assignees of the policy: "After Vose became insane he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein and to be affected by a failure to perform the condition of the contract. Although Vose was their guardian, if incapacitated by his insanity a competent person could have been appointed in his place; and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby." Those who expect to share in the proceeds of the policy, when paid, cannot trifle with the subject nor delay action that would naturally result in compliance with the requirements of the contract.

If the appointment of an executor or administrator cannot for any reason be secured with ordinary promptness, it would not be a reasonable construction of the policy to cast all the risk and inconvenience of the delay upon the insurer, provided those interested in the estate could procure the appointment of a temporary representative, who, by taking the necessary steps, could keep the covenants entered into by the insured.

It is provided by section 2670 of the Code of Civil Procedure that, on the application of a creditor, or a person interested in the estate, the surrogate may in his discretion issue to one or more suitable persons letters of temporary administration, where delay necessarily occurs in the granting of letters testamentary or of administration owing to a contest before the surrogate, arising on an application therefor or for probate of a will, or for any other cause. At least ten days' notice must be given to each party to the proceeding who has appeared, but the period may be shortened to not less than two days by the surrogate upon proof that the safety of the estate requires it. A temporary administrator, thus appointed, "has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of those purposes, he may maintain any action or special proceeding." (§ 2672.) It is further provided that, "where a temporary administrator is appointed, in consequence of a contest respecting a will of real property, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding." (§ 2675.) While other powers are conferred by statute, or may be conferred by the surrogate, under its

authority, upon a temporary administrator, these are sufficient for the purpose of discussing the question now before us.

The will of Mrs. Silvernail embraced both real and personal property, including by specific mention the farm upon which the burned buildings stood, and indirectly the produce destroyed, through the power to sell the same in order to pay pecuniary legacies. The executor was given the right to sell the farm after five years, with power to lease the same in the meantime. The income, after deducting interest and taxes, was to be applied upon the incumbrances, and the proceeds of the sale, after payment of all the debts of the testatrix, were to be divided among her children.

A fire insurance policy, after a loss has occurred, is a chose in action, and a temporary administrator could collect the same and, if necessary, commence an action for that purpose. Whether the proceeds, when collected, would be real or personal property, or both, is unimportant in this case, as the power to collect is the vital fact. That power necessarily implies the further power to do whatever is requisite in order to perfect the chose in action so that collection can be enforced, for the power to do an act includes the power to do all that is reasonably necessary to do it effectively. (*Hall v. Lauderdale*, 46 N. Y. 70, 73; *Parker v. Supervisors*, 106 N. Y. 392.) Independent, therefore, of the provisions of the statute empowering the surrogate to confer authority upon the temporary administrator in regard to real estate, when there is a contest respecting a will of realty, we think that the right to collect the policy carried with it the right to serve all such notices as the policy required, in order to make it collectible. Hence, it was within the power of the persons expecting to share in the property of the testatrix to do something toward keeping her covenants with the defendant. While it is true that their application, if made to the surrogate, was subject to his discretion, it cannot be presumed that he would have hesitated to appoint a temporary administrator if the facts, bearing upon the subject, were spread before him that appear in the record now before us. (*McGregor v. Buel*, 24 N. Y. 166, 169.)

Moreover, even if the application, although made in due time and form, had failed, it would have relieved the beneficiaries under the will from the accusation of negligence that is now brought against them, for they could say in answer thereto, "We have done all that we could." No excuse, sufficient or otherwise, for non-action was shown, such as absence, insanity, infancy, or want of knowledge that the fire had taken place. The subject of applying for a temporary administrator was under discussion among the heirs while the contest over the will was in progress. Not long after Mrs. Silvernail died, the plaintiff deposited the will with the surrogate, and informed him that he did not want to have anything to do with it, but after the lapse of several months, upon the request of certain creditors of the testatrix, he consented to act, and thereupon proceedings were begun to prove the will. Mrs. Silvernail left three children, each of whom was a devisee or legatee under the will, and all were of full age and competent to act, except one, who was an infant of thirteen when her mother died. Two of them, at least, lived within sight of the building in question at the time of the fire. So far as appears, therefore, there was no reason why a temporary administrator should not have been applied for and appointed. The contingency of death was foreseen and provided against by provisions in the policy which kept it alive notwithstanding that event. (*Dolan v. Rodgers*, 149 N. Y. 489; *Dexter v. Norton*, 47 N. Y. 62.) The legal representative was by the contract substituted as "the insured," upon whom rested the burden of performing those covenants which Mrs. Silvernail had entered into. The insurance company was under no obligation to procure the appointment of an administrator, temporary or permanent, even if it had been in a position to, because its promise to pay was dependent on prior action by the insured, but those entitled to the proceeds of the policy when paid were bound to do so, if they could by reasonable effort, so that the agreement could be performed on the part of "the insured."

If the executor could have acted by virtue of the power con-

ferred by the will, without probate or other action by the surrogate, his default is too apparent to require discussion.

Upon the assumption that the legal representatives of the insured, referred to in the policy, included the heirs at law, next of kin, legatees or devisees, as the case may be, the situation of the plaintiff is not improved, because, according to that theory, there was no time when competent persons, sustaining one or more of those relations to the decedent, with full knowledge of all the facts, could not have given the preliminary notice and furnished the proofs of loss. (*Wyman v. Wyman*, 26 N. Y. 253; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *Greenwood v. Holbrook*, 111 N. Y. 465.) The delay in serving notices and in bringing the action was in no respect owing to the defendant, which, so far as appears, did nothing to mislead any one, or to waive the defenses it now insists upon.

Some evidence was giving tending to show that a son of the testatrix, about ten days after the fire, signed and swore to a statement of the loss and delivered it to an aunt, but he could not tell what she did with it. She died before the trial and there was no satisfactory evidence to show that the statement sworn to by the son ever reached the defendant. One witness testified that he saw a lady, who, as he thought, was a "Silvernail," deliver a paper to a man who claimed to be an adjuster and that they talked about the loss. The nature or contents of the paper was not shown and it did not appear that the man was an adjuster for the defendant, except by the verification of the answer, which was not put in evidence. But even assuming that there was evidence to sustain a finding that both the preliminary and final notice of loss were given to the defendant as required by the policy, the fact remains that this action was not begun until long after the time limited for that purpose had elapsed, and yet no lawful reason is given for not procuring temporary administration in time to have sued within the stipulated period.

Therefore, whether the policy means by legal representative the appointee of the surrogate, or some person directly

interested in the estate, or both, there was a failure to comply with its provisions, with no excuse for non-compliance. (The "insured" was bound by contract to do certain acts, as conditions precedent to the right to recover, and was under a legal obligation, if there were obstacles in the way, of making a reasonable effort to remove them. (*Howland v. Edmonds*, 24 N. Y. 307, 308; *Porter v. Kingsbury*, 71 N. Y. 588; *Reining v. City of Buffalo*, 102 N. Y. 308.) If, after due diligence, they had proved insurmountable for a time, the delay would have been excusable, and performance at the earliest practicable moment thereafter would have been sufficient, but to excuse non-performance it must appear that the act to be done could not, by any reasonable means, have been accomplished. Mere difficulty of performance is not enough. (*Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543, 551.) In *Sanford v. Sanford* (62 N. Y. 553) it appeared that the defendant's intestate was adjudged an idiot in 1847, and that the committee then appointed died in 1854. The intestate died December 9, 1864, and during the ten years preceding his death he had boarded with the plaintiff and was clothed and cared for by her, and she paid his necessary funeral expenses, yet it was held that the Statute of Limitations applied to the whole claim accruing before the death of the intestate. Judge ALLEN said: "There was no legal impediment to an action against the intestate. Had there been a committee in office, the creditor could have petitioned the court either for a summary adjustment and payment of her claim, or for leave to sue. As there was no committee, although it seems the judgment of the court, determining that the debtor was *non compos mentis*, was in force, the plaintiff might have applied to the court for leave to sue, or, perhaps, have brought an action without such leave. One or the other of these courses was open to the plaintiff, and which would have been the proper practice it is not necessary to determine."

The failure to apply for a temporary administrator and to endeavor through him to give the notices required by the

policy and essential to perfect the cause of action, and then to have suit brought therefor within the period stipulated, was absolute and without excuse, and hence the plaintiff, upon the facts now presented, was not entitled to recover. The motion for a nonsuit, which raised generally or specifically all of the defenses discussed, should have been granted because it affirmatively appeared that the conditions of the policy had not been complied with by "the insured."

The judgment of the Appellate Division not only sustained the exceptions taken by the defendant upon the trial, but also dismissed the complaint on the merits. This it had no power to do. The Code of Civil Procedure provides two methods of review by the Appellate Division, before the entry of judgment, when the trial was before a jury. The first is authorized by section 1000 which permits the presiding judge, in his discretion, to order that the exceptions taken during the trial be heard in the first instance by the Appellate Division and that judgment be suspended in the meantime. In such a case, as the section further provides, "the exceptions must be heard upon a motion for a new trial, which must be decided by the Appellate Division." The decision should either grant or deny the motion. If the exceptions were well taken, the motion should be granted and the case sent back for a new trial. If the exceptions were not well taken, the motion should be denied and judgment entered on the verdict, or the order of nonsuit as the case may be. (*Huda v. American Glucose Co.*, 151 N. Y. 549.) The only function of the Appellate Division is to grant or deny the motion and order judgment accordingly. It cannot go farther and dismiss the complaint on the merits, because the Code does not authorize it. The verdict or order is the authority for the entry of a final judgment, and if the exceptions are not sustained the judgment must be in favor of the party for whom the verdict was rendered, while, if the exceptions are sustained, there can be no final judgment, but simply the award of a new trial.

The second method of reviewing before judgment is when a verdict is taken subject to the opinion of the court as author-

ized by section 1185 of the Code. In such a case the motion is not for a new trial, but for judgment, and it may be made by either party before the Appellate Division under section 1234. The decision of a motion of that kind necessarily involves a direction for judgment.

As the case now before us arose under section 1000, the action of the learned Appellate Division in dismissing the complaint was inadvertent and without authority.

The judgment appealed from should, therefore, be so modified as to sustain the defendant's exceptions and order a new trial, and as so modified affirmed, with costs to abide event.

MARTIN, J. (dissenting). In this case the cause of action did not accrue until after the death of the testatrix. At that time there was no person who was authorized to enforce or comply with the provisions and requirements of the policy. Until a representative of the estate of the testatrix was appointed, who was authorized to commence an action and perform the conditions of the policy, neither the contractual limitation commenced to run nor was the previous non-performance of its condition a bar to the action. The fact that the appointment of a temporary administrator might have been applied for does not change the situation. Whether an administrator would be appointed rested wholly in the discretion of the surrogate, and no certainty that it would have been done existed at any time. The creditors and other persons interested in the estate were not required to make that experiment to protect their rights under the policy.

I think the judgment should be reversed.

VANN, J., reads for modification and affirmance; ANDREWS, Ch. J., GRAY, BARTLETT and HAIGHT, JJ., concur; MARTIN, J., reads memorandum for reversal, and O'BRIEN, J., concurs.

Judgment modified and affirmed.

EDWARD R. SCHAFER, as Administrator of FRANZ SCHAFER,
Deceased, Appellant, v. THE MAYOR, ALDERMEN AND COM-
MONALTY OF THE CITY OF NEW YORK, Respondent.

1. MUNICIPAL CORPORATIONS — LIABILITY FOR CONDITION OF STREET. If a city suffers the public to treat land in a laid out and partially improved, but not formally opened, street as an ordinary street, it is bound to keep it in a reasonably safe condition.

2. OBSTRUCTION IN STREET — NEGLIGENCE. Leaving a water-main manhole, with a cover projecting for several inches above the surface, in the middle of a traveled track which the city is bound to keep in a reasonably safe condition as a street, constitutes an obstruction which will raise a question of fact as to the negligence of the city in case a traveler is injured thereby.

3. CONTRIBUTORY NEGLIGENCE. When, in an action for damages for a death caused by the negligence of another, there is some evidence showing the exercise of reasonable care by the decedent, the fact that, owing to the circumstances, the evidence of care is weak, does not justify taking the question of contributory negligence from the jury.

4. DEATH CAUSED BY DRIVING AGAINST OBSTRUCTION IN STREET — EVIDENCE OF CARE. In an action to recover from the city of New York damages for a death caused by the collision of the wagon driven by the decedent with a projecting manhole cover in the middle of the traveled track in an unpaved street, the evidence showed that just before striking the manhole cover, the decedent had been thrown from his seat on to the pole, in crossing the curb of an intersecting avenue, which, as partially worn down by travel, formed a part of the beaten track, about twenty feet from the manhole and very near an elevated railroad column; that in passing over the curb he was seen to get a better hold on the lines and to be in control of his horses; and that in the interval before striking the manhole cover he was balancing on the pole and struggling to keep on the wagon. *Held*, that while the evidence of care on the part of the decedent was weak, it called for a submission of the question of contributory negligence to the jury, as the jury could have found that, situated as he was, the peculiar circumstances surrounding him relieved the decedent from the exercise of greater care.

Schafer v. Mayor, 12 App. Div. 384, reversed.

(Argued November 29, 1897; decided December 7, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1896, affirming a judgment entered upon a nonsuit granted at Trial Term.

N. Y. Rep.]

Points of counsel.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

The facts, so far as material, are stated in the opinion.

Maurice Untermeyer for appellant. The circumstances of the accident and the actions of the deceased, as described by the witnesses, not only tend to show the absence of contributory negligence on his part, but there is direct evidence that he exercised due care; therefore, the case should have been submitted to the jury. (*Chisholm v. State*, 141 N. Y. 246; *Pettengill v. City of Yonkers*, 116 N. Y. 558; *Hart v. H. R. B. Co.*, 80 N. Y. 622; *Miller v. N. Y. C. & H. R. R. Co.*, 82 Hun, 164; *Johnson v. H. R. R. Co.*, 20 N. Y. 65; *Galvin v. Mayor, etc.*, 112 N. Y. 223; *Rodrian v. N. Y. H. & H. R. R. Co.*, 125 N. Y. 526; *Greany v. L. I. R. R. Co.*, 101 N. Y. 419; *Massoth v. D. & H. C. Co.*, 64 N. Y. 524; *Bassett v. Fish*, 75 N. Y. 303.) The acceptance and use by the public of a street constitutes it a public street so far as the duty of the city to keep it in safe condition is concerned, and the city having allowed such use without dissent is estopped to deny that it was a public street. It is a question of fact for the jury to determine whether there was such use of One Hundred and Twenty-seventh street east of Second avenue. (*Phelps v. City of Mankato*, 23 Minn. 276; *Sewell v. City of Cohoes*, 75 N. Y. 45; *Gallagher v. City of St. Paul*, 28 Fed. Rep. 305; *City of Cohoes v. Morrison*, 42 Hun, 216; *Requa v. City of Rochester*, 45 N. Y. 129.) The city, by putting the manhole in the street and having the street patrolled by the police, assumed authority to control the land as a street, and it is liable for the injuries resulting from its negligence in not keeping it safe. (*Mayor, etc., v. Sheffield*, 4 Wall. 189; *Sewell v. City of Cohoes*, 75 N. Y. 45.) The city is bound to keep its public streets in a reasonably safe condition for travel, and should not invite the public to use them before it has placed them in that condition. (*Byrne v. City of Syracuse*, 79 Hun, 555; *Taft v. City of Troy*, 18

Wkly. Dig. 478; *Sewell v. City of Cohoes*, 75 N. Y. 45; *Weed v. Vil. of Ballston Spa*, 76 N. Y. 329; *Saulsbury v. Vil. of Ithaca*, 94 N. Y. 27; *Turner v. City of Newburgh*, 109 N. Y. 301.) The trial court erred in holding that the city was guilty of no negligence in maintaining the manhole in the manner that it did. (L. 1881, ch. 105.) If it should be decided that One Hundred and Twenty-seventh street, where the accident occurred, was not a public street, the city should still be held liable for the damages resulting from its act in placing the manhole at a dangerous elevation in a traveled path over which the city had no control. (*Clifford v. Dam*, 81 N. Y. 52.) The city had sufficient notice of the dangerous condition of the street. The continued existence of the manhole in the condition in which it was at the time of the accident and the fact that it was placed there by the city is sufficient to establish constructive notice to the city of its condition. (*Wilson v. City of Troy*, 135 N. Y. 96; *Walsh v. Mayor, etc.*, 107 N. Y. 220; *Turner v. City of Newburgh*, 109 N. Y. 301; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Russell v. Village of Canastota*, 98 N. Y. 496; *Nelson v. Village of Canisteo*, 100 N. Y. 89; *Ehrgott v. Mayor, etc.*, 96 N. Y. 273; *Barnes v. District of Columbia*, 91 U. S. 540; *Barton v. City of Syracuse*, 36 N. Y. 54; *Kunz v. City of Troy*, 104 N. Y. 344.)

Theodore Conoly for respondent. There is no evidence of negligence on the part of the defendant in maintaining the manhole. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Hines v. City of Lockport*, 50 N. Y. 236; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Monk v. Town of New Utrecht*, 104 N. Y. 552; *Ring v. City of Cohoes*, 77 N. Y. 83; *Dubois v. City of Kingston*, 102 N. Y. 219; *Macomber v. Taunton*, 100 Mass. 255; *Todd v. City of Troy*, 61 N. Y. 506; *Kunz v. City of Troy*, 104 N. Y. 344; *Masterton v. Vil. of Mount Vernon*, 58 N. Y. 391.) There is no evidence that the plaintiff was free from contributory negligence. (*Tolman v. S., B. & N. Y. R. R. Co.*, 98 N. Y. 198; *Rodrian v. N.*

N. Y. Rep.]

Opinion of the Court, per VANN, J.

Y., N. H. & H. R. R. Co., 125 N. Y. 526; *Wiwrowski v. L. S. & M. S. R. Co.*, 124 N. Y. 420; *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465; *McDonald v. L. I. R. R. Co.*, 116 N. Y. 546; *Weston v. City of Troy*, 139 N. Y. 281.) The evidence requires the conclusion that the deceased was guilty of contributory negligence. (*Robinson v. M. R. Co.*, 5 Misc. Rep. 209; *Roe v. Crimmins*, 10 Misc. Rep. 711.)

VANN, J. The scene of the accident which gave rise to this controversy was a point in the city of New York where 127th street, running substantially east and west, crosses at right angles Second avenue, which runs nearly north and south. At this place, in September, 1894, an elevated railroad ran through the avenue supported by iron columns, two of which stood in the central line of the street and two more on the line of the crosswalk on the easterly side of the avenue as it crosses the street. From the avenue toward the east the street had not been graded, paved or lighted, but as early as 1881 the legislature had made it the duty of the city to open it as a street (L. 1881, ch. 105); and, although never formally opened, a sewer had been constructed in it by the city; it was patrolled by policemen and it had been used by the public as a street for many years. The witnesses described it as a thoroughfare and evidence was given tending to show that from thirty to one hundred vehicles of different kinds passed over it every day. In 1887 the city laid a water main through this part of the street and left the cover of a manhole projecting about five inches above the surface of the ground, apparently in anticipation of paving the street at some time, when the top of the projection would become level with the pavement. The cover was a circular iron box about eighteen inches in diameter. The manhole, covered in this way, was in the center of the street as bounded by the lots and buildings on either side, and was about in the easterly line of the easterly crosswalk of the avenue and a few feet southeasterly of one of the iron columns. There were two traveled ways in the street as it crossed the avenue, each about fifteen feet wide, one on either

side of the iron columns that stood in the central line of the street.

At about six o'clock in the afternoon of Sunday, September second, 1894, the plaintiff's intestate, a healthy man about twenty-eight years old and weighing two hundred pounds, was driving a large truck, heavily loaded with kegs of beer and drawn by two powerful horses, with the intention of delivering some beer at Sulzer's Park, a place of resort on the south side of 127th street and directly east of the avenue. He drove southerly on the westerly side of Second avenue toward 127th street, and when near the latter stopped, and his helper alighted to go across and open the gate of the park. The deceased then turned his team to the east and drove in the traveled way on the north side of the street. Directly before him then was the curb on the easterly side of the avenue which projected several inches above the surface of the street and the grade from the curb to the east was upward at an angle of between four and five degrees. The traveled way was directly across the curb, and it was necessary to drive over it. A little to his left after crossing the curb stood one of the iron columns, and almost in front of him, about twenty feet easterly from the curb, was the manhole in question. He started his horses at a quick trot, apparently to get enough momentum to carry his heavy load over the curb and up the incline beyond. Evidence was given tending to show that as he crossed the curb he was bounced upward from his seat, which was eight or ten feet from the ground, and that he then fell forward on to the pole and, when the left wheel forward struck the cover of the manhole, he was thrown to the ground, one of the wheels passed over him, and he died almost instantly. His body was found at a point about twenty feet easterly from the manhole, and when the horses stopped, the rear of the truck was not far from the manhole. One witness said that "the hind wheels were straight with the manhole, and the other wheels were toward the other way," apparently meaning toward the south. Another witness testified that when the front wheels struck the curb the decedent

was jounced and lost his balance. He reached forward and got a tighter grip on his lines at the time he was jounced. He fell forward on to the pole, and when the left front wheel hit the manhole he fell to the ground and the wagon passed over him. "He had not lost control of the horses at the time. I suppose he tried to get a tighter hold so that he could not catch the manhole—so that he could get away out of the manhole." When the plaintiff rested the trial judge dismissed the complaint upon the ground that no negligence had been shown on the part of the city, and that, as the decedent must have seen the manhole when he approached it, he was to be deemed negligent in driving against the cover. The Appellate Division, by a divided vote, affirmed the judgment entered upon the nonsuit, and the plaintiff appealed to this court.

We agree with the learned Appellate Division that it was a question for the jury to decide whether the use of the locality as a street was permitted by the city; that if the city suffered the public to treat the land as an ordinary street it was bound to keep it in a reasonably safe condition, and that leaving a manhole with a cover projecting for several inches above the surface of the ground nearly in the middle of the street was an obstruction to travel which presented a question of fact for the jury as to the negligence of the defendant.

The critical point in the case is the question of contributory negligence, upon which the learned judges of the court below were divided in opinion. Just what the decedent did or tried to do during the few seconds that preceded his death can never be known, as he died without telling his story. The plaintiff, his legal representative, apparently called every witness who could throw any light upon the subject, and from their evidence it was clear that the manhole was plainly visible directly in front of the intestate as he was driving toward it. The jury might have found that he was not familiar with the locality, as he was not a regular driver of the truck, and he does not appear to have ever been there

before. Can it be said, as a matter of law, that under the circumstances he saw or should have seen the manhole and avoided it? His truck was long, heavy and unwieldy, and could not easily be turned in a short space, so that the curve that he had to make in order to reach his destination presented a somewhat difficult task in driving, as the iron column and the manhole were to be avoided, and he had to go rapidly so as to get over the curb with his load. The jouncing caused by passing over the curb threw him forward on to the pole, as the jury might have found, and prevented him from guiding his horses and from seeing just where they were going at the moment. When the fore wheels of the wagon had advanced twenty feet farther, while he was in this situation, the jolt, caused by striking the cover of the manhole, threw him under the wheels and he was killed. No observer states that he was paying attention to anything except his business of driving. He was seen to lean forward to get a better hold of the lines, which, in the language of one of the witnesses, "all good drivers do," and this indicated that he was paying attention to the business in hand. If he had survived the accident, it would have been necessary for him, in order to meet the burden of proof, to state what he did and what he tried to do fully and explicitly; but, as he is dead, less evidence is required of his personal representative. (*Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526; *Fitzgerald v. N. Y. C. & H. R. R. R. Co.*, 154 N. Y. 263.) The plaintiff's intestate was bound to exercise reasonable care; but if, owing to the circumstances, the evidence of care was weak, it does not follow that it was not for the consideration of the jury. If there was any evidence upon the subject, the case should have been submitted to them for decision. There was evidence tending to excuse the decedent for not seeing the manhole after he fell forward, but there was no evidence of care on his part except the fact that he got a better grip on his lines, and that he had not lost control of his horses. While striking the manhole caused the accident, jouncing over the curb placed him in a position of danger and naturally prevented him from

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Opinion of the Court, per VANN, J.

seeing, thinking or acting as he ordinarily would. The height of the curb, which was variously stated by the witnesses at from two and one-half to eight inches, made it necessary for him, if he crossed at all with so heavy a load, to go fast enough so that the momentum would carry him over, as otherwise the wheels would have become blocked. The curb was a part of the beaten track over which all vehicles passing that way were accustomed to go, so that the original height of the curb had been reduced by the passing of many wheels by several inches. Under these circumstances we think that he was not bound to go back, even if there was room to turn around, and not discharge his duty of delivering beer at Sulzer's Park, and that the jury might have found that he was not negligent, situated as he was, in driving over it as he did. Why should he not have crossed, since, in legal effect, the defendant, impersonated, stood there inviting him to? As he was passing over it he was seen to exercise some care in getting a better hold of the lines and in still retaining control of his horses. After he had passed over he was unexpectedly thrown into a situation of danger that would naturally cause some mental confusion. The horses were still going rapidly up the incline and had but twenty feet farther to go before the forward wheel struck the manhole. During the mere instant of time required to go that short distance he was balancing on the pole and struggling to keep on the wagon. If he had retained his seat so that he could have seen the manhole it would have been his duty to make due effort to avoid it, but situated as he was the jury could have found that the peculiar circumstances surrounding him relieved him from the exercise of greater care. While the question is so close as to invite difference of opinion, we think that the case should have been submitted to the jury.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS, Ch. J., GRAY and HAIGHT, JJ., dissenting.

Judgment reversed.

MARYANNA HUDA, as Administratrix of VALENTINE HUDA,
Deceased, Appellant, v. THE AMERICAN GLUCOSE COMPANY,
Respondent.

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1. MASTER AND SERVANT — MANUFACTURING ESTABLISHMENTS — FIRE ESCAPES. Screwing down the sashes in the windows adjoining the fire escapes on a manufacturing establishment, and requiring the employés to keep them closed, in order to maintain a high temperature necessary to the work carried on, do not constitute a violation of the statute prescribing the maintenance of fire escapes embracing "windows at each story and connecting with the interior by easily accessible and unobstructed openings" (L. 1892, ch. 673, § 6), provided the sashes are so light as to be easily broken through.

2. NEGLIGENCE. Screwing down light and easily broken sashes, in windows adjoining the fire escapes on a manufacturing establishment, and requiring the employés to keep them closed, in order to maintain a high temperature necessary to the work carried on, in a building properly constructed for the purposes of its intended use, do not constitute negligence or breach of duty on the part of the employer towards those employed in the building.

3. ASSUMPTION OF RISKS. If an employé in a manufacturing establishment subject to the statutory requirements as to fire escapes, is familiar with his employer's method in respect to escape in case of fire, and has for a long period worked under and acquiesced in the conditions under which his work is necessarily done, he must be deemed to have assumed the risks of the situation, where such method and conditions violate no statutory requirement.

Huda v. American Glucose Co., 12 App. Div. 624, affirmed.

(Argued December 2, 1897; decided December 14, 1897.)

APPEAL, by certification, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 21, 1896, upon an order which overruled plaintiff's exceptions to the direction of a verdict by the trial judge in favor of defendant, ordered to be heard in the first instance by the Appellate Division, denied a motion for a new trial and directed judgment for the defendant.

The nature of the action, the questions certified and the material facts are stated in the opinion.

Le Roy Parker for appellant. The origin of the fire was due to the negligence and want of care of defendant in not providing and maintaining safe electrical appliances in the dynamo room. (*McAdam v. R. R. Co.*, 67 Conn. 340; *Harroun v. B. E. L. Co.*, 12 App. Div. 126; *Coddington v. B. C. R. R. Co.*, 102 N. Y. 67; *Mayer v. Liebmann*, 16 App. Div. 54; L. 1891, ch. 105; *Woolsey v. Trustees of Ellenville*, 84 Hun, 236; *Poulsen v. N. E. R. R. Co.*, 18 App. Div. 221; *Jones v. U. R. Co.*, 18 App. Div. 267; *Stillman v. N. Y. S. Co.*, 17 App. Div. 397; *Clarke v. N. E. R. R. Co.*, 9 App. Div. 52; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562.) The defendant's method of screwing down the windows of the building in which the deceased was employed, so that there was no access to the fire escape except by breaking the windows, and forbidding the employees of the defendant engaged in that building from opening the windows, and requiring them to keep a high temperature in the work rooms, such as was necessary to accomplish the business carried on in these rooms, was a violation of the statute requiring a construction and maintenance of fire escapes in such building. (L. 1890, ch. 398; L. 1892, ch. 673, § 6; *Gorman v. McArdle*, 67 Hun, 487; *Pauley v. S. G. & L. Co.*, 131 N. Y. 92; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 376; *Willy v. Mulledy*, 78 N. Y. 310; *Schwandner v. Birge*, 33 Hun, 186; *Corcoran v. Holbrook*, 59 N. Y. 517; *Stringham v. Stewart*, 100 N. Y. 516; *Stringham v. Hilton*, 111 N. Y. 188; *Eastwood v. R. M. Co.*, 86 Hun, 99; 152 N. Y. 651; *Morrison v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 643.) The act of screwing down the windows was a violation of a statutory duty. It was also negligence irrespective of the statute. (*Pauley v. S. G. & L. Co.*, 131 N. Y. 90; *Willy v. Mulledy*, 78 N. Y. 314; *McRickard v. Flint*, 114 N. Y. 222; *Benton v. McMillan*, 2 Scam. 436; *Summerville v. Marks*, 58 Ill. 371; *S. D. Co. v. Young*, 77 Ill. 197; *Eastwood v. R. M. Co.*, 86 Hun, 96; 152 N. Y. 651; *Johnson v. S. G. & L. Co.*, 146 N. Y. 160; *Weeks v. Cornwell*, 104 N. Y. 336; *O., etc., R. R. Co. v. Collarn*, 73

Ind. 264.) The deceased did not assume the risk of death by fire. (*Willy v. Mulledy*, 78 N. Y. 310; *Knisley v. Pratt*, 148 N. Y. 378; *Pauley v. S. G. & L. Co.*, 131 N. Y. 95; *Benzing v. Steinway & Sons*, 101 N. Y. 552; *McGovern v. C. V. R. R. Co.*, 123 N. Y. 280; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 40; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 376; *Felice v. N. Y. C. & H. R. R. R. Co.*, 14 App. Div. 351; *E. C. E. S. Co. v. Kelley*, 29 Atl. Rep. 423; *Tel. Co. v. McMullin*, 50 N. J. 155; *Clark v. Holmes*, 7 H. & N. 937.) Evidence contradicting defendant's sworn answer, standing unamended, was clearly incompetent, as it substantially changed the defendant's defense and raised an entirely new issue. (Code Civ. Pro. § 723; *Heath v. N. Y. B. L. B. Co.*, 146 N. Y. 260; *Alden v. Clark*, 86 Hun, 357.) The proof of plaintiff in this case was given chiefly by servants of the defendant. Their evidence is somewhat conflicting, and this was proper ground for leaving the case to the jury. (*Kuechenmeister v. Brown*, 1 App. Div. 56.) As a verdict was directed against the plaintiff, she is entitled to the most favorable inferences that can fairly be drawn from the evidence. (*Doing v. N. Y., O. & W. R. Co.*, 151 N. Y. 579; *H. Bank v. A. D. & T. Co.*, 148 N. Y. 619; *Raabe v. Squier*, 148 N. Y. 81.) Such facts as are in evidence in this case should go to the jury. (*Willy v. Mulledy*, 78 N. Y. 310; *Eusticood v. R. M. Co.*, 86 Hun, 99; 152 N. Y. 651; *Johnson v. S. G. & L. Co.*, 146 N. Y. 160; *Freeman v. G. F. P. M. Co.*, 61 Hun, 132; 142 N. Y. 639; *Gaul v. R. P. Co.*, 72 Hun, 485; 145 N. Y. 603; *Hawley v. N. C. R. Co.*, 82 N. Y. 370.)

John G. Milburn for respondent. The defendant's method of fastening the windows of its building was not a violation of the statute requiring the construction and maintenance of fire escapes on the building. (L. 1892, ch. 673, § 6; 13 Misc. Rep. 661.) None of the acts stated in the first question was evidence of negligence on the part of the defendant that should have been submitted the jury. (*Pauley v. S. G. &*

L. Co., 131 N. Y. 90; *Jones v. Granite Mills*, 126 Mass. 84; *Ruppert v. B. H. R. R. Co.*, 154 N. Y. 90; *Bond v. Smith*, 113 N. Y. 378; *Taylor v. City of Yonkers*, 105 N. Y. 209; *Morris v. L. S. & M. S. R. Co.*, 148 N. Y. 182; *Knisley v. Pratt*, 148 N. Y. 372.) As the deceased was familiar with the defendant's method of screwing down the windows and for a long period had worked under and acquiesced in that state of things, as certified by the Appellate Division, he assumed the risks of the situation, and the plaintiff is not entitled to recover. (*Crown v. Orr*, 140 N. Y. 452; *Gibson v. E. R. Co.*, 63 N. Y. 452; *Knisley v. Pratt*, 148 N. Y. 372; *Anthony v. Leeret*, 105 N. Y. 591; *De Forest v. Jewett*, 88 N. Y. 264.)

GRAY, J. The Appellate Division of the Supreme Court, in the fourth department, has certified to this court certain questions for review, in an action brought to recover damages for the alleged negligence of the defendant, whereby the plaintiff's intestate lost his life. A verdict was directed at the Circuit for the defendant upon the evidence and the Appellate Division, after overruling the plaintiff's exceptions, which were ordered to be first heard there, unanimously ordered judgment to be entered for the defendant.

A brief preliminary statement of the facts, as established upon the trial, will aid in the discussion of the questions certified.

In the evening of April 12th, 1894, the defendant's factory, in the city of Buffalo, was destroyed by fire. The building was eight stories in height and occupied a space of 160 feet on Scott street by 200 feet in depth. The business conducted therein was the manufacture of glucose and the deceased was one of the workmen employed. The fire was alleged to have originated in some defect in the electric plant used for lighting the building. When the fire broke out, the deceased was at work upon the sixth floor and he, with some others, ran down the stairway to the fourth floor; where the thick smoke prevented their further progress. Some of them then broke

through a window and escaped to the ground by a fireman's ladder. The deceased was last seen near the foot of the stairway and did not follow his companions to the window. What, in fact, happened then to him is not known and becomes purely a matter of presumption. There were three distinct stairways in this building, leading from the top floor to the bottom floor, and two leading from the top floor to a flat roof. A large covered bridge led from the fifth and sixth floors to an adjoining building, which many of the workmen had been in the habit of using as a means of access to, and of return from, the four upper stories. Upon the outside of the building were three fire escapes, extending from the roof to the ground; two being upon the south and one upon the north walls. Two windows upon each floor opened upon balconies, which were constructed in connection with the fire escapes. In the process of the manufacture of glucose, it was necessary that a high and uniform temperature should be kept up within the factory and, to that end, the windows in the building were required to be kept closed. Directions to this effect being unobserved, at first, strips of wood were so nailed to the sashes as to prevent the windows from being opened; but these having been pried off at times, the more effective means had been resorted to, during the previous autumn, of screwing the sashes together and notices were posted warning the workmen against opening, or breaking, the windows, under penalty of discharge. The windows in the building were constructed with two light sashes, containing, each, four panes of glass about sixteen inches square. The sash frames were from an inch and a quarter to an inch and a half thick. The deceased had been working for the defendant for about twelve years and the knowledge of the employés, as to the fastening of the windows, was testified to by several of the plaintiff's witnesses. When the fire occurred, the fire escapes were made use of by many by breaking through the windows; while some escaped by the stairways, or by ladders. These facts are sufficient to inform us of the situation and to enable us to consider the questions certified. They are,

"1. Whether the defendant's method of screwing down the windows of the building in which the deceased was employed, so that there was no access to the fire escapes, except by breaking the windows, and forbidding the employees of the defendant engaged in that building from opening the windows, and requiring them to keep a high temperature in the work rooms, such as was necessary to accomplish the business carried on in these rooms, was a violation of the statute requiring a construction and maintenance of fire escapes on such buildings.

2. Whether doing the acts stated in the first question, or any of them, was evidence of negligence on the part of the defendant that should have been submitted to the jury.

3. Whether the deceased, who was familiar with the defendant's methods as stated in the first question, and for a long period had worked under and acquiesced in the conditions stated in the first question, assumed the risks of the situation and whether, by reason thereof, the plaintiff is not entitled to recover in this action."

The statute referred to in the first question, (Laws of 1892, chapter 673, section 6), provided for the manner of construction of fire escapes upon factory buildings and that they should have landings, or balconies, of a certain size, "embracing at least two windows at each story and connecting with the interior by easily accessible and unobstructed openings."

The answer to the first question turns upon the propriety of the resort by the defendant to the methods adopted, to keep the temperature of its factory sufficiently high and uniform. That such conditions were necessary, is the fact assumed by the question and it is conclusive here. Obviously, for their maintenance the windows had to remain closed and the duty of the defendant to its employes, in the face of that necessity, was not to interpose, between them and the means of escape, such a barrier in the description of window constructed, as would prevent a ready passage through them. The proof as to these windows is that they were so light in frame, as to offer but the slightest difficulty in breaking

through; if the time was wanting to unscrew them. The interior of the factory was connected with each balcony upon the fire escape, through windows easily accessible by an unobstructed passage and the requirement of the statute was thus met. If the windows, as "openings," were readily approached from the interior and could be passed through, it cannot be said that the necessity of having to break them, which the testimony showed was easily done, constituted any greater obstruction, than would have been the necessity of uncatching and of lifting them. The reading of the provisions of the statute, upon the subject of fire escapes in factories, must be reasonable and in view of the demands of the case. The construction of the fire escapes must be as prescribed for the outside of the factory building and, unquestionably, that part of the law which requires a connection to exist with the interior is not to be slighted. But, it would be wholly unreasonable to interpret the law as requiring a condition as to the openings upon the fire escapes, which the successful prosecution of the business would forbid. There had to be a closed window during the manufacturing process and, whether it was composed of one sash, or of two sashes fastened together, was immaterial; so long as it was readily removable by breaking through and a ready access to and through it was preserved. The evidence shows that there was no serious obstruction at all to a passage to and through the windows. It must be borne in mind that all questions of fact are to be regarded as settled, with the unanimous affirmance by the Appellate Division, and we must assume every issuable fact in the case as determined below in favor of the defendant. Thus, we have not before us any of the questions, as to which negligence is alleged by the plaintiff; except the one which relates to the defendant's method of preventing its windows from being opened, during the operation of its factory, and, as to that, discussion is largely foreclosed by the assumption of fact that it was "necessary to accomplish the business carried on in these rooms."

The first question certified is answered, therefore, in the negative.

The second question certified must be likewise answered in the negative. The discussion of the first of the questions renders amplification of our views quite unnecessary. If the method adopted by the defendant was not a violation of the statute in question, then there was no evidence of negligence in that respect for submission to the jury. At common law, there was no duty imposed upon the employer to provide fire escapes, in anticipation of the burning of the building in which he employed his workmen. If his building was properly constructed for the purposes of its intended use, such extraordinary and unusual precautions were not demanded of him. The statute of 1887 (Chap. 462) created the absolute duty and its effect was to give a cause of action for its breach, in favor of any one entitled to its observance and injured by a breach. (*Willy v. Mulledy*, 78 N. Y. 310; *Pauley v. S. G. & L. Co.*, 131 id. 90.) For reasons already stated, I am unable to perceive any breach of duty here in the respect certified to us.

It may be observed, as it might have been in our discussion under the first question, that the evidence utterly fails to show that the condition of the windows had anything to do with the death of the deceased workman. It does not appear that he tried ineffectually, or at all, to get through them and the manner of his death is left to surmise from the probabilities of his situation, when upon his reaching the fourth floor, in his descent, he was involved in the smoke.

In considering the third question certified, I think, with the assumption of facts to which the formulation of the question compels us, that but the one answer is possible and that is that the deceased assumed the risks of the situation. An employ   is, very reasonably, regarded as assuming those risks in his employment, which are obvious, as well as ordinary. If the master has done all that his duty demanded of him, with respect to securing the safety of his workmen, as to the place where they have been set to work and as to the tools and appliances with which that work was to be done, he will not be liable for a personal injury, occurring by reason of a risk which is incidental to the business itself, or which results from

the dangers of the environment into which the workman knowingly entered, under proper instructions. In discussing this point, we have to assume that the deceased met his death from a cause connected with the fastening of the windows, without, perhaps, sufficient in the evidence to warrant the assumption. But the difficulty is not so much in that assumption, as in that found in the question certified. That compels us to assume the knowledge of the deceased of the defendant's methods and his acquiescence in the conditions under which the work was necessarily done. The court below has passed upon those facts, with all the force of findings, and the form of the question certified eliminates them from our review. If the deceased knew the defendant's methods and acquiesced in those resorted to by it in the conduct of its business, we are simply thrown back upon the discussion under the first question; whether there was any violation of the statute in what the defendant did. Having reached the conclusion that there was none, no other conclusion, in the present stage of the discussion, is possible, than that the defendant added nothing to the risks assumed by its employes and imposed none which they should not be regarded as assuming.

Of course, it is not to be understood from what has been said that it necessarily follows that employes would assume such risks connected with the management of the business, as would result from a violation by the employer of the statute, in a neglect to provide fire escapes. That presents a different question.

The first two of the questions certified are answered in the negative and the third question is answered in the affirmative and it, therefore, follows that the judgment appealed from must be affirmed, with costs.

All concur, except HAIGHT, J., absent.

Judgment affirmed.

WILLIAM A. DYKMAN, as Receiver of THE COMMERCIAL BANK,
Respondent, v. SETH L. KEENEY et al., Defendants; DAVID
W. BINNS, Appellant.

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168	212

CORPORATIONS — ACTION BY RECEIVER AGAINST DELINQUENT DIRECTORS — ACTION AT LAW. Where an action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law, and something more is required to warrant the intervention of a court of equity than mere allegations showing that the acts complained of are numerous and complicated, that they are difficult of ascertainment without a discovery with respect to them, and that a multiplicity of actions would be necessary if all the directors who were in office during the whole or a part of the time within which the acts complained of were committed could not be associated as defendants in one action.

Dykman v. Keeney, 21 App. Div. 114, reversed.

(Argued December 6, 1897; decided December 14, 1897.)

APPEAL, by certification, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 9, 1897, which affirmed an interlocutory judgment in favor of plaintiff overruling a demurrer to the complaint.

The allegations of the complaint, the grounds of the demurrer and the questions certified are stated in the opinion.

Henry M. Dater and *George F. Elliott* for appellant. An action in equity by a corporation or its receiver against its delinquent directors will not lie to compel them to account for damages due to the negligent or other tortious acts of the directors unattended with profits to such directors. (*O'Brien v. Fitzgerald*, 143 N. Y. 377; 6 App. Div. 509; 150 N. Y. 572; *Higgins v. Tefft*, 4 App. Div. 62; *E. S. S. Bank v. Beard*, 151 N. Y. 638; 81 Hun, 184; *Place v. Minster*, 65 N. Y. 89; *Ambler v. Choteau*, 107 U. S. 586; Morawetz on Corp. § 521; Taylor on Corp. [2d ed.] § 626; 2 Lindley on Part. 595, 596; *Parker v. McKenna*, L. R. [10 Ch.] 96;

Gruman v. Smith, 81 N. Y. 25; *Root v. Ry. Co.*, 105 U. S. 189; *F. F. Ins. Co. v. Jenkins*, 3 Wend. 130; *Gaffney v. Colvill*, 6 Hill, 567.) The plaintiff herein is not entitled to the intervention of equity upon the ground of the necessity of a discovery. (*O'Brien v. Fitzgerald*, 143 N. Y. 377; *Higgins v. Tefft*, 4 App. Div. 62; *E. S. S. Bank v. Beard*, 151 N. Y. 638; *Uhlman v. N. Y. L. Ins. Co.*, 109 N. Y. 421; *Root v. R. Co.*, 105 U. S. 189; Code Civ. Pro. § 1914; *Glenney v. Stedwell*, 64 N. Y. 120; *King v. Leighton*, 58 N. Y. 383; *Ex parte Boyd*, 105 U. S. 657; *Rindskopf v. Platto*, 29 Fed. Rep. 130; *Town of Venice v. Woodruff*, 62 N. Y. 462.) There are no complications of accounts, and equity has no jurisdiction to interfere for the purpose of apportioning the joint and several liability in a personal action at law. (*O'Brien v. Fitzgerald*, 6 App. Div. 509; *Higgins v. Tefft*, 4 App. Div. 62; *E. S. S. Bank v. Beard*, 151 N. Y. 638; *Porter v. Spencer*, 2 Johns. Ch. 169; *Uhlman v. N. Y. L. Ins. Co.*, 109 N. Y. 421; *Phillips v. Phillips*, 9 Hare, 471; *Hicks v. Sallet*, 27 Eng. Law & Eq. 213; *P. C. Co. v. D. & H. C. Co.*, 31 N. Y. 91; Pollock on Torts, § 171; *Merriweather v. Nixon*, 8 T. R. 186; *Adamson v. Jarvis*, 4 Bing. 66.) There is no ground for the intervention of equity for the purpose of preventing a multiplicity of suits. (*O'Brien v. Fitzgerald*, 6 App. Div. 509; *Higgins v. Tefft*, 4 App. Div. 62; *E. S. S. Bank v. Beard*, 151 N. Y. 638; *Pfohl v. Simpson*, 74 N. Y. 137; *Bouton v. City of Brooklyn*, 15 Barb. 375; 2 Story's Eq. Juris. §§ 853, 854; *Tribeth v. Railway Co.*, 70 Miss. 182; *Stanton v. M. P. R. Co.*, 15 C. P. R. 296; *Nash v. H. S. Co.*, 90 Hun, 354; Story's Eq. Pl. § 271; 1 Foster's Fed. Pr. § 71; *Campbell v. Mackay*, 1 M. & Cr. 603, 608; *L. & B. S. R. R. Co. v. Goodman*, 15 How. Pr. 85; *Swift v. Eckford*, 6 Paige, 22; *Enos v. Thomas*, 4 How. Pr. 48.)

Herbert T. Ketcham for respondent. There is such a thing as a sound complaint in equity against parties situated as are these defendants. The only test is whether the complaint

contains allegations apt and appropriate to the conceded jurisdiction. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52; 99 N. Y. 185; 105 N. Y. 567.) This court should reject the dogma that an action against directors of a bank for accounting can only be maintained as to assets of which they have had actual title and possession. (*Sayles v. C. Nat. Bank*, 18 Misc. Rep. 155.)

GRAY, J. This action is brought by the receiver of the Commercial Bank against certain persons, who either were formerly directors of the bank, or who are the personal representatives of deceased directors. The complaint alleges that these directors were such between April, 1886, and August, 1893; some during all of that period of time and others during varying periods of time between those dates. It charges the defendants, during the several periods while they were in office, with conduct which was negligent, wasteful and in violation of the statute in many respects and the result of which was to effect the ruin of the bank. It shows that loans and discounts were made in excess of the amount allowed by law; that losses were permitted to occur to an amount in excess of the undivided profits, thereby creating a deficit in the capital of the bank; that debts were suffered to remain without prosecution and on which no interest had been paid for more than one year; that, in the calculation of profits for the purpose of dividends, debts and the interest accrued and unpaid on the same were included; that pretended dividends on the shares of bank stock were made as from undivided profits, when, in fact, they were paid out of the capital stock; that obligations were permitted to be renewed without the payment of the accrued interest; that overdrafts were permitted to be made; that loans were made to persons, who were already indebted to the bank, or who were known to be engaged in hazardous enterprises, or upon pretended security known to be inadequate; that certain of the directors were allowed to obtain a preference over the bank by judgment and execution against a certain mining company, which was largely indebted

to the bank, when, if the bank's claim against the company's property had been duly enforced, it might have been, at least in part, collected; that they retained in office a cashier, with knowledge that he was dishonest, incompetent and guilty of a falsification of the books of the bank, and, finally, that reports were caused to be made to the superintendent of the banking department, which contained misstatements and which were made to insure a continuance of the bank in business. It is alleged in the complaint that none of the acts complained of were completely accomplished by all of the directors; that certain of them were done during their several periods of office; that the persons, mentioned as having done the acts complained of within periods of time specified, are severally liable for the separate and personal misconduct of such acts and in separate and different amounts therefor; that, as to many of the acts complained of, the plaintiff is unable to determine or allege the degree in which the particular directors have respectively participated, or the proportion or amount of their liability. The complaint alleges that the acts complained of were numerous and complicated and that many were not recorded in the books of the bank; that the books and accounts do not contain accurate records of the acts which were done in the name of the bank by the directors, while they were respectively in office, and that plaintiff is unable to determine the number, or the nature, of the said acts, or the sums of money involved therein respectively. It is alleged that the plaintiff has not knowledge or information sufficient to enable him to prove the acts complained of, unless a discovery and an account thereof be made by the defendants, and that, unless relief is granted to him against all of the defendants, as hereinafter prayed for, it will be necessary for him to bring and maintain a multiplicity of actions, to the delay of his administration, and that, by reason of the matters alleged, he has no adequate remedy at law in the premises. The prayer of the complaint is for a judgment, first, that the defendants were guilty of negligence, waste and violation of duty under the law, in doing the acts alleged;

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second, that the bank had suffered loss and damage by reason of such acts and that the plaintiff is entitled to recover from each of the defendants, respectively, the amount which shall, upon an accounting in this action, appear to be due from them respectively and, third, that an account be taken between the plaintiff and each of the defendants and that each defendant make discovery, not only as to the acts and transactions done in the name of the bank by any of the directors, but also as to the liability of each of the defendants and the degree and proportion of such liability, and that upon such an account the damages sustained by the bank may be ascertained and that the plaintiff recover from the defendants respectively the separate and different amounts for which each of the defendants may be found to be severally liable for the several and personal misconduct in the premises of himself or his decedent.

One of the defendants has demurred to the complaint, upon the grounds that there was an improper joinder of causes of action and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled at the Special Term and, upon appeal to the Appellate Division, there was an affirmance of the Special Term judgment. An application for leave to appeal was granted by the Appellate Division and two questions of law were certified for review by this court, viz. : whether the complaint in this action / sets forth a cause of action in equity and, second, whether there has been an improper joinder of causes of action in the / complaint herein.

I think that the present appeal is controlled by our disposition of the case of *O'Brien v. Fitzgerald* (150 N. Y. 572). That, like this, was an action brought by receivers of a bank to recover against its directors for the negligent performance of their duties and the demurrer to the complaint raised a similar question to that now before us. When that case first came before this court (143 N. Y. 377), we all concurred in the opinion that the demurrer should be sustained. Judge FENCH, who delivered the opinion of this

court, observed that, on its face and in its form, the action was one at law, to recover damages for negligence and that no facts were stated which indicated a need of the intervention of a court of equity. He pointed out several respects, in which the complaint was wanting in proper averments to make out an equitable cause of action, and he concluded that, while the formal demand of relief is not decisive of the legal or equitable character of the action, yet the demand for a money judgment therein was consistent with a perfect cause of action in the complaint to recover damages at law.

When that case again came before this court (150 N. Y. 572), certain amendments had been made in the complaint. Allegations were inserted, to the effect that, by reason of the several liability of the defendants for personal misconduct and breaches of trust and of the necessity for the court to determine the extent to which each defendant was chargeable, full and adequate relief could not be granted, unless the defendants were required to account in the action for their respective acts and that, unless relief were thus granted against all the defendants, it would be necessary to bring and maintain a multiplicity of suits, involving great expense to the estate and delay in the plaintiffs' administration of their trust. It was, also, alleged that, for the completeness of the plaintiffs' remedy, it was necessary that the several defendants should make discovery as to their conduct and management of the affairs of the bank. It was, further, alleged, that the plaintiffs had no adequate remedy at law and they prayed for judgment that the defendants be required to account with respect to their administration of the trusts reposed in them; that their liability be apportioned among them and the amount of the liability of each fixed and determined; that a decree be rendered against each for an amount equal to the injury to the trust fund administered by them and that they make full discovery as to their participation in the breaches of trust set forth.

The Appellate Division then affirmed the judgment of the Special Term sustaining the second demurrer to the complaint

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(6 App. Div. 509); but certified to us the same questions as have been certified in the present case. We affirmed the judgment upon the opinion below, holding that the amended complaint did not set forth a cause of action in equity, and that there had been an improper joinder of causes of action. The opinion delivered at the Appellate Division had reviewed the several cases in which the question under discussion had been considered and, in the light of that review, came to the conclusion that the case had not been changed by the amendments to the complaint. It was said of them, that they were not allegations of fact, but were conclusions as to the liability of the various defendants and expressed merely the opinion of the pleader as to the necessity of equitable intervention. It was held that there were no facts stated, which showed that a discovery was requisite to the completion of the remedy, or that an accounting was necessary, and that there were no facts alleged which brought the case within any of the principles which courts of equity administer. It was observed, with respect to the allegation, that a multiplicity of suits would be required; that it was a multiplicity of actions against a multiplicity of people, rather than against one person, which latter case, only, would justify equitable interference. The opinion of Judge INGRAHAM summed up the argument in this wise: "Where his liability to his *cestui que trust*, or to the corporation of which he is a director or trustee, is not to account for specific property, but for damages because of his negligent act in the performance of his duty, a different principle arises as to his liability, from that of a case where, in consequence of his relation to the property of the trust, he is bound to show what disposition of that property has been made, being chargeable with the value of the property."

It is very clear, therefore, that we are committed by our decision in *O'Brien v. Fitzgerald*, to the view that where the action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law and that something more

is required to warrant the intervention of a court of equity, than mere allegations showing that the acts complained of are numerous and complicated; that they are difficult of ascertainment, without a discovery with respect to them, and that a multiplicity of actions would be necessary, if all the directors, who were in office during the whole or a part of the time within which the acts complained of were committed, could not be associated as defendants in one action.

While some observations of Judge FINCH, when the case of *O'Brien v. Fitzgerald* was first before us, have been pointed out, as indicating that such an action might lie in equity, they were made with respect to the case appearing by the complaint before him and it is very clear from his opinion that he entertained a grave doubt as to whether an equitable action could be at all supported upon the facts pleaded. His expression as to that was as follows: "My doubt about that is very grave, although I leave the question open." Again the doubt appears, when, after remarking that some cases seem to allow the remedy of a suit in equity by a corporation against its directors to recover losses, he says: "Granting that, and granting also what I am not now ready to admit as the law of this state, that the facts pleaded in the present case are sufficient to support the action as an equitable one, we are left by the pleader in a doubt which can only be solved by recurring to the demand for relief." The question was, therefore, left an open one and was met upon the second demurrer to the amended complaint in *O'Brien v. Fitzgerald*. It is, again, here in even a stronger form.

That an action in equity will lie by a stockholder against the directors of his corporation, for violations of their duties, or breaches of the trust committed to them, is well settled and as recently asserted as in the case of *Brinckerhoff v. Bostwick* (88 N. Y. 52; 105 N. Y. 567). But, as it was observed by Judge FINCH in the opinion referred to, there is a wide and vital difference between such a case and one where the action is by the corporation against its delinquent directors. Quite lately, the case of *Empire State Savings Bank*

of *Buffalo v. Beard* (151 N. Y. 638), was disposed of by us upon the authority of *O'Brien v. Fitzgerald*. That case was very similar to the present one, with respect to the acts complained of on the part of the trustees of the savings bank, and presented a continuous system of mismanagement. The General Term had there held that the action would lie in equity in order to prevent a multiplicity of actions. In the case of *Higgins v. Tefft* (4 App. Div. 62), the opinion of this court in *O'Brien v. Fitzgerald* was followed, and similar conclusions reached, as were affirmed by us upon the second appeal in that case.

In such actions as these the defendants, as directors, are not proceeded against, strictly, as trustees, but as agents acting for a principal and for any damage caused by their neglect and violation of duty the remedy at law is adequate. The difficulties of proving the wrongful and neglectful acts of directors, the extent to which each has participated in the acts of mismanagement alleged and the proportion or degree of their liability to respond in damages, are no greater in a court of law than they would be in a court of equity. They are chargeable, not with the sums which have been lost, but only for the direct injury to the bank which resulted from the neglect of their duties. Directors of a corporation are not vested with the title to the property of the corporation, and, therefore, as trustees, liable to account in equity for the disposition which they may have made of it. They are agents of the corporation, upon whom duties devolve of management and of care; for a failure in the performance of which they will be held liable at law for the damages, which their corporation may be shown to have sustained. Discovery is one of the elements of the right to resort to equity, but it would not properly consist in the ascertainment by the complainant of the several or proportionate liabilities of the defendants to the corporation for damages sustained by their neglect in the performance of the duties devolved upon them. It had reference, usually, to where an accounting was involved and a statement required of items

of debit and credit, or of specific property with which the defendant was chargeable. It was the resort of a defendant, when sued at law, in aid of his defense; which, without a discovery, might fail of establishment. No accounting is necessary in such an action as this; for, if all the facts be true, there would be no sum of money, as to which these defendants, or either of them, would be held liable to account.

Without further discussion, the conclusion I have reached is that, although the pleader has endeavored, in the framing of his complaint, to give to it an equitable form, he has failed to do more than to show, and to enlarge upon, the difficulties of the plaintiff's situation and of making the proof to sustain a recovery. It only sets forth a cause of action for damages for the negligent and wrongful acts of these directors; where equitable relief is unnecessary and where the defendants ought not to be deprived of their constitutional right of a trial by jury. If there is any hardship in these views and if it is urged, (which I do not admit), that the difficulty of holding delinquent directors responsible for their wrongful and negligent acts is added to and should require a different rule, the remedy should be sought for in legislation, which would permit that form of action which the law of the state does not now, in my judgment, permit.

The questions certified to us are answered as follows:

1st. Whether the complaint in this action sets forth a cause of action in equity. Answer, no.

2d. Whether there has been an improper joinder of causes of action in the complaint herein. Answer, yes.

The judgments appealed from should be reversed and the demurrer of the appellant is sustained, with costs.

All concur, except MARTIN, J., not voting.

Judgments reversed.

THE COLONIAL CITY TRACTION COMPANY, Appellant, v. THE
KINGSTON CITY RAILROAD COMPANY, Respondent.

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STREET SURFACE RAILROADS — PROCEEDING TO ACQUIRE USE OF CONNECTING TRACKS. The requirement of the Railroad Law which, by virtue of section 91, compels a street surface railroad company to obtain the consents of the local authorities and abutting owners to such use before it can apply to acquire the right to use the connecting track of another company by a proceeding *in invitum* under section 102 of that law, is absolute and does not depend upon what the defendant company might have the power to voluntarily agree to.

(Submitted December 6, 1897; decided December 14, 1897.)

MOTION for a reargument. (See 153 N. Y. 540.)

G. D. B. Hasbrouck and *Charles Stewart Davison* for motion.

A. T. Clearwater opposed.

VANN, J. This motion for a reargument is based on the possibility that the court may have overlooked one of the points presented both orally and in writing on the argument. This possibility is founded on the fact that the point is not discussed by the court in its opinion, but, as we have held, that fact gives rise to no such inference in any case, and in this case it is expressly stated that the reason for not adopting the opinion of the Appellate Division, which, as reported, discusses the point supposed to have been overlooked, was to avert further litigation by deciding a question that, although presented by the record, was not decided by that learned court. (*Kamp v. Kamp*, 59 N. Y. 212, 221; *Dammert v. Osborn*, 141 N. Y. 564.) The point that the appellant apprehended was overlooked was duly considered by us, although no expression of consideration appears in the opinion. It is, in substance, that inasmuch as the defendant succeeded to the rights of a company organized prior to the amendment of the Constitution in 1874, it has the right, if it chooses, to allow

the use of its tracks by other roads, and that this right could not be infringed upon by subsequent legislative enactments; that such right, as it is further argued, can be exercised by the defendant without regard to whether the road with which it desires to contract was organized prior to the constitutional or statutory enactments, or subsequent thereto; and upon this assumption, it is urged, that as the law provides for an appeal to the courts where there is an unreasonable refusal of property owners, so the law provides for an appeal to the courts where there is an unreasonable refusal by such a company as the defendant. The conclusion that we are asked to reach from this line of argument is that as the property owners' consent "is compellable at law," so, where a road can voluntarily grant the right to use its tracks, "it is compellable to grant it through procedure in the courts," even if the statutory consents have not been obtained by the road making the application.

As the plaintiff was organized in 1896, and succeeded to the rights of a company organized in 1893, the Constitution and Railroad Law as existing since the latter date control its rights, whatever effect they may have upon organizations of an earlier date. The Railroad Law is the only authority for this proceeding, and the plaintiff, as the moving party in the effort to acquire certain rights through the power of eminent domain, was bound to proceed strictly in accordance with its requirements. (*Matter of Kings County Elevated Railway Co.*, 82 N. Y. 95, 99; *Matter of Union Elevated Railroad Co.*, 113 N. Y. 275, 279.) These requirements are general. They make no discrimination based upon the rights or powers of the road proceeded against, and are not affected by what that road can voluntarily consent to. If the defendant has the right to lease its road to another company, that right cannot be invoked by the plaintiff as a substitute for the statutory requirements nor made the sole foundation of a proceeding to compel the defendant to permit the use of a portion of its tracks. The statute contains nothing that expressly or impliedly sanctions such a conclusion. The plaintiff must

move upon its own status and cannot rely upon the status of the defendant in opposition to its wishes.

As we aimed to demonstrate in the opinion giving our reasons for affirming the judgment, the consents of the local authorities and the abutting owners to the use of the intervening track of the defendant by the plaintiff are, by virtue of section 91 of the Railroad Law, conditions precedent to the proceeding to acquire such use under section 102 of that law. In other words, the plaintiff is not in a position to make the application until it has first obtained such consents. The prohibition of the Railroad Law is absolute so far as the plaintiff, proceeding *in invitum*, is concerned, and does not depend upon what the defendant might have the power to voluntarily agree to.

It is also suggested that our opinion has raised apprehension as to its effect as a precedent upon railroad leases and traffic agreements, of which there are said to be many now in force all over the state. It was not our intention to decide any case but the one before us, which simply involved the standing of the plaintiff to make the application in question, and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance. The failure to read the opinions of courts with this fact in mind gives rise to much fruitless litigation.

The motion should be denied.

All concur, except GRAY and O'BRIEN, JJ., not voting.

Motion denied.

ANNETTE C. HERSEE and CARRIE H. CORT, Respondents, v.
LOUIS W. SIMPSON, Appellant.

1. WILL — REMAINDER. A remainder is not to be considered as contingent in any case where, consistently with the intention of the testator, it may be construed as being vested.

2. "FROM AND AFTER." The words "from and after," in a testamentary gift of a remainder, following a life estate, do not make the remainder contingent and prevent its being construed as vested, where there is nothing else on the face of the will tending to show that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator.

3. WILL CONSTRUED — VESTED REMAINDER. The will of a testator who left a wife and children surviving devised a life estate in his real property to his wife and provided that, "from and after her decease," the property should be disposed of according to the statutes governing the descent of real property. *Held*, that the heirs of the testator upon his death took a vested remainder in his real property.

Hersee v. Simpson, 20 App. Div. 100, affirmed.

(Submitted December 10, 1897; decided December 17, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 18, 1897, in favor of plaintiffs upon a submission of controversy.

The controversy in this case was submitted to the Appellate Division in the fourth department upon admitted facts. The submission was in pursuance of the provisions of article 2 of title 2, chapter XI of the Code of Civil Procedure, which includes sections 1279 to 1281. The facts upon which the questions in this case arise are fully set forth in the case agreed upon.

On the twentieth of February, 1897, the plaintiffs and defendant entered into an agreement for the sale and purchase of certain property situated in the city of Buffalo, N. Y., the former agreeing to convey to the latter a good and marketable title to the premises described. The consideration was \$9,900, one hundred dollars of which was to be paid at the signing and delivery of the contract, and \$4,800 in cash and a

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bond and mortgage for \$5,000 to be paid and delivered at the time of the delivery of the deed. This contract was made by Annette C. Hersee, widow of Thompson Hersee, deceased, and as executrix of his last will and testament, and by Carrie H. Coit, as his sole heir at law and legatee.

Subsequently, the plaintiffs made and properly executed a warranty deed to the defendant of the premises described in the contract. The form and manner of its execution were in all respects satisfactory. The deed was then tendered to the defendant, and the plaintiffs demanded that he fulfill the contract, which he refused to do upon the ground that the plaintiffs could not give a good and valid title to the property. The plaintiffs' title depends upon the provisions of the will of their testator, and it was upon the ground that they did not take a valid title to the property under it that the defendant based his refusal to accept the deed.

By the first provision of his will, the testator gave to a grandchild the sum of ten thousand dollars upon the express condition that she lived to the age of twenty-one years, and if she did not, then the bequest was to become wholly inoperative. The grandchild named died in infancy, unmarried, and without issue before the death of the testator. The only provision of the will which has any bearing upon the question involved in this case is as follows: "*Second*. All the rest, residue and remainder of my estate, real and personal, of every name and nature (subject to the contingent payment of the above legacy), I bequeath and devise to my wife, Annette C. Hersee, to have, hold and enjoy the same with the rents, issues and profits thereof during the term of her natural life, and from and after her decease my will is that all of my said property be disposed of according to the statutes of the state of New York governing the descent of real property and the distribution of personal estates." By the third clause his wife was appointed sole executrix of his will, which was duly admitted to probate December 9, 1884, as a will valid to pass real and personal property, and letters testamentary were duly issued to the executrix named.

The contention of the defendant is that a deed from the plaintiffs would not convey the fee of the premises for the reason that by the testator's will his widow acquired a life estate in the property, and as, by its terms, the real property was to be disposed of from and after her death according to the laws of the state of New York governing the descent of real property, until that event happens the persons entitled to take the remainder cannot be ascertained, and that, although if Carrie survives her mother, she will take the whole of the property, yet at present she has only a contingent remainder in the premises, and, therefore, a conveyance by them would not give a good or marketable title.

The learned Appellate Division held that the heirs of the decedent took a vested remainder in his real estate at the time of his death, and that the whole title was in the plaintiffs when the contract between them and the defendant was made. That the decedent was the owner of the property in question, and that the defendant would obtain a good title under the deed tendered, provided the heirs at law of the testator took a vested remainder in his real estate at the time of his death, are not denied or questioned by either party. So that the single question to be determined upon this appeal is whether the testator's only daughter and heir at law has a vested remainder in his real estate.

The testator died in December, 1884, seized of the property in question. He left surviving his widow, Annette C. Hersee, a son of full age, William M. Hersee, and a daughter of full age, Carrie H. Coit, and no other issue or lineal descendants. William died in September, 1891, unmarried, without issue and intestate.

Fred W. Ely for appellant. The individuals forming the class that will take under testator's will, cannot be determined until the time that the estate is to be divided, and that time has not yet arrived. (*Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Stevenson v. Lesley*, 70 N. Y. 512; *Teed v. Morton*, 60 N. Y. 506; *In re Baer*, 147 N. Y. 348; *Delaney v. McCor*

mack, 88 N. Y. 174; *Clark v. Cummann*, 14 App. Div. 127; *Delafeld v. Shipman*, 103 N. Y. 463; *In re Allen*, 151 N. Y. 243.)

Tracy C. Becker for respondents. The law favors the immediate vesting of estates. (2 R. S. [9th ed.] 1790, § 3; *Sheridan v. House*, 4 Keyes, 569; *Moore v. Lyons*, 25 Wend. 144; *Manice v. Manice*, 43 N. Y. 368; *Gilman v. Reddington*, 24 N. Y. 9; *Byrnes v. Stilwell*, 103 N. Y. 460; *Scott v. Guernsey*, 48 N. Y. 106; *Traver v. Schell*, 20 N. Y. 89; *Everitt v. Everitt*, 29 N. Y. 39; *Loder v. Hatfield*, 4 Hun, 36; 71 N. Y. 92; *Livingston v. Greene*, 52 N. Y. 118; *Moore v. Littell*, 41 N. Y. 85; *Embury v. Sheldon*, 68 N. Y. 227.) Time is not attached to the substance of the gift, nor is the gift founded upon a direction to divide at a future time. (*Nelson v. Russell*, 135 N. Y. 137; *Letchworth's Appeal*, 30 Penn. St. 175; *Williams v. Freeman*, 98 N. Y. 577; *In re Mahan*, 98 N. Y. 372; *Livingston v. Greene*, 52 N. Y. 118; *Moore v. Lyons*, 25 Wend. 144.) The intention of the testator must govern the construction of his will. (*Bowditch v. Ayrault*, 138 N. Y. 222; *Embury v. Sheldon*, 68 N. Y. 236; *Weston v. Goodrich*, 12 App. Div. 250; *Van Nostrand v. Marvin*, 16 App. Div. 28; *Loder v. Hatfield*, 71 N. Y. 92; *Coit v. Rolston*, 44 Hun, 548; *In re Young*, 145 N. Y. 535; *In re Seaman*, 147 N. Y. 69; *Bushnell v. Carpenter*, 92 N. Y. 273.) The will must be construed by the application of legal rules to the language of the testator, but the intention of the testator must prevail, and the will must be construed with reference to that intention, so far as such construction does not violate legal principles. (*Campbell v. Stokes*, 142 N. Y. 23; *Bowditch v. Ayrault*, 138 N. Y. 222; *In re Young*, 145 N. Y. 538; *Loder v. Hatfield*, 71 N. Y. 92; *In re Seaman*, 147 N. Y. 69; *Coit v. Rolston*, 44 Hun, 548; *Smith v. Edwards*, 88 N. Y. 105.) The vested remainder in the estate of Thompson Hersee, deceased, belonging to William M. Hersee, the testator's son, upon said William M. Hersee's death, intestate,

unmarried and without issue, passed to and vested in his sister, Carrie H. Coit. (2 R. S. [9th ed.] 1825, § 6.) The joining of Annette C. Hersee, as devisee under the will of Thompson Hersee, deceased, and Carrie H. Coit, as sole surviving heir at law of Thompson Hersee, deceased, as guarantors in a warranty deed, conveys a good, valid and marketable title to the real estate of which the said Thompson Hersee died seized, which the defendant is bound to accept. (2 R. S. 1790, § 11; *Embury v. Sheldon*, 68 N. Y. 237; *Manice v. Manice*, 43 N. Y. 370.)

MARTIN, J. In determining the question involved, the inquiry is presented whether the testator intended to confer upon his widow a life estate in all his property with a vested remainder in those who should be his heirs at the time of his death, or whether his intent was to postpone the vesting of the remainder until the death of the life tenant. As bearing upon this question, it is to be observed that the testator created no trust by his will. He devised a life estate in his real property to his wife, and provided that, from and after her decease, the property should be disposed of according to the laws of the state of New York governing the descent of real property. Thus the question is narrowed to this: Were the words "from and after" her death sufficient to limit to a contingent remainder the estate which was devised to his heirs. Obviously, the question is the same as if the testator had, in express terms, devised his property to his wife for life, and from and after her death to his heirs. Indeed, that is the substance and effect of the provision in the testator's will.

The rule is well settled in this state that a remainder is not to be considered as contingent in any case where, consistently with the intention of the testator, it may be construed as being vested. Words or phrases denoting time, such as when, then, and "from and after," in a devise of a remainder, limited upon a particular estate determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the

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time of its vesting. This is especially so in the construction of devises of real estate. (*Moore v. Lyons*, 25 Wend. 119, 144; *Sheridan v. House*, 4 Keyes, 569; *Livingston v. Greene*, 52 N. Y. 118, 123; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Nelson v. Russell*, 135 N. Y. 137.) Many other cases might be cited where this doctrine has been held, but we have deemed it necessary to refer only to such as are in all their essential particulars like the present case. In *Moore v. Lyons* there was a devise of real estate to one for life, and "from and after" his death to three others, and it was held that the remaindermen took a vested interest at the death of the testator. In the *Sheridan* case there was a grant of lands for life to one, and after his decease to his heirs, and there it was determined that his heirs took a vested estate. In the *Livingston* case the testator gave his wife a life estate in his real property, and then devised to his children all his real estate "from and after" the death of his wife, which it was held created a remainder in the children which vested at the death of the testator. In the *Ackerman* case the testator devised certain real estate to his wife to be enjoyed by her during life, and "from and immediately after her decease" to be divided among his children, and again this court held that upon the death of the testator his children took a vested remainder in the lands so devised. In *Nelson v. Russell* it was held that the words "from and after" in a testamentary gift of a remainder, following a life estate, were insufficient to justify the conclusion that the remainder was contingent and not vested, and that unless their meaning was enlarged by the context they were to be regarded as defining the time of the enjoyment simply, and not the vesting of title, that the presumption was that the testator intended that his disposition should take effect in enjoyment or interest at the date of his death and upon the happening of that event, unless the language of the will, by fair construction, made his gifts contingent, they would be regarded as vested.

The principle of these cases is entirely decisive of the question involved in this case. There is nothing upon the face of

the will, aside from the words "from and after," which in any way tends to sustain or give color to the construction that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator.

Moreover, the general policy of the law favors a construction which includes the vesting of estates and consequent certainty in respect to the title to property, and which prevents the disinheritance of the issue of a remainderman who may die during the existence of the precedent estate. This principle is based upon the idea that, in the absence of express words, it cannot be supposed that such was the intent. In the case at bar, the testator gave all his residuary estate to his wife for life, and "from and after" her death to those who would inherit it under the statutes governing the descent of real property. When we apply to this provision the rule stated, it becomes manifest that his heirs upon his death took a vested remainder in all his real property.

The learned counsel for the appellant has called our attention to several cases which are claimed to be in conflict with this conclusion. An examination of them, however, discloses that the questions involved in this case were not presented in the cases to which he refers, or that the facts and provisions of the will in those cases were so variant as to render them of no especial value as authorities upon the question before us. We deem it unnecessary to discuss or examine in detail the cases cited, or to point out the clear distinction which exists between them and the case under consideration, as it would serve no good purpose.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ALFRED LYMAN DARROW et al., Appellants, *v.* LYMAN DARROW CALKINS et al., Respondents.

1. **PARTITION — LIMITATION OF ACTION — INFANCY.** The plaintiffs in an action of partition, brought by the heirs of a deceased partner, claiming title to his original undivided interest in partnership lands, which he had deeded to his copartner for partnership purposes, were infants at the death of their decedent, and the action was not commenced until thirty years after his death, nor until fifteen years after the younger of the plaintiffs became of age. *Held* (following *Howell v. Learitt*, 95 N. Y. 617), that the plaintiffs, although they had slumbered upon their rights during an adverse possession of twenty-seven years, were not barred by the Statute of Limitations.

2. **JURISDICTION — INFANTS.** When service of summons upon infant defendants in partition is by publication, the court acquires no jurisdiction to appoint a guardian *ad litem* or to render a judgment binding upon them as parties, prior to the expiration of the period of publication.

3. **PARTNERSHIP — CHARACTER OF REALTY.** In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property, between the partners themselves and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs.

4. **CHARACTER OF PARTNERSHIP REALTY.** To the extent necessary for the purposes of partnership equities, the character of partnership real estate, in the absence of any agreement, express or implied, between the partners to the contrary, is to be deemed, in equity, changed into personalty; but the portion of the land not required for such equities retains its character as realty, and is subject to the ordinary operation of the laws of inheritance and descent.

5. **INTENTION OF PARTNERS.** Where it appears, by the express or implied agreement of the partners, that it was their intention that partnership lands should be treated and administered as personalty for all purposes, effect will be given thereto.

6. **CONVERSION INTO PERSONALTY.** Real estate purchased for partnership purposes with partnership funds, and used in the partnership business, may be deemed absolutely converted into personalty for all purposes, on the ground of intention.

7. **CONVERSION OF PARTNERSHIP REALTY INTO PERSONALTY — EFFECT UPON HEIRS OF DECEASED PARTNER.** One of two partners deeded to the

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other the grantor's undivided interest in partnership land, which had been purchased by them as copartners with partnership funds. The deed declared that the land was to be held by the grantee as partnership property, contained a power of management and sale, and stated that the grantee was to "pay over" to the grantor, "his heirs and assigns or other legal representatives, such portion thereof as shall at the closing of the partnership business belong to or be due or coming to" the grantor, "his heirs executors, assigns or other legal representatives." *Held*, that the deed did not contravene the Statute of Uses and Trusts; that it disclosed an intention of the partners, and hence operated, to convert the land into personality and to substitute in place of the grantor's prior interest in the land as such an interest in him and his representatives in any surplus which should remain after a sale by the grantee and the adjustment of the partnership affairs; and that, on the death of the grantor, a decree adjusting the partnership affairs and adjudicating the claim of the estate of the grantor in the partnership assets at a certain sum, in an action brought by his administratrix, was binding upon the grantor's heirs, not as parties to the action, but from the character of the property, as between them and the grantee or his representatives, and precluded them from maintaining an action to partition the land.

Darrow v. Calkins, 6 App. Div. 28, affirmed.

(Argued November 29, 1897; decided December 17, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 12, 1896, which vacated and set aside an interlocutory judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term, and granted a motion for a new trial under section 1001 of the Code of Civil Procedure.

The action was for partition of certain lands in the city of Brooklyn. The plaintiffs, as children and heirs at law of one Edwin J. Darrow, who died intestate November 13th, 1864, claimed title to one undivided half of such land, subject to the dower right of two of the defendants, as set forth in the complaint. The defendants, Calkins, are the widow and three children of one Daniel O. Calkins, who died intestate July 20th, 1887. It is alleged in the complaint that Edwin J. Darrow, at the time of his death, "was seized in fee simple" of the undivided one-half part of the premises sought to be partitioned, and Daniel O. Calkins of the other undivided one-half. It alleges that on the 25th day of Sep-

tember, 1861, the said Edwin J. Darrow, together with his wife, Lucy P. Darrow, made and executed "a certain deed in trust" bearing date on that day, which was recorded in the county of Kings January 19th, 1865, whereby the said Edwin J. Darrow and his wife conveyed all their estate in the aforesaid real property to the said Daniel O. Calkins, "to have and to hold, to control and manage, sell and convey the whole or any part of said premises as part of the partnership property of the aforesaid Calkins and Darrow, and to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to the said Darrow, his heirs, executors, assigns or other legal representatives." It alleges in substance that a copartnership had existed up to the death of Darrow in 1864, between him and Calkins, under the firm name of Calkins and Darrow; that the trust upon which the deed of September 25, 1861, was made had not been performed; that no accounting had been had to "these plaintiffs or to any court having jurisdiction in the matter;" that the copartnership had long since ceased and terminated; that there were no outstanding debts of the firm, and that the purpose of the said trust had ceased to exist, and the trust, if ever operative, had terminated.

The interests of the respective parties, as claimed by the plaintiffs, are set forth, in substance, that the plaintiffs are each entitled to an undivided fourth part of the premises, and the children of Calkins to the other one-half part, subject to dower interests as stated.

The complaint further states that a "certain pretended" judgment was entered on the 31st day of October, 1867, in the Supreme Court of the state of New York, in an action brought by Lucy P. Darrow (the widow of Edwin J. Darrow), as administratrix of his estate, against Daniel O. Calkins and others, for the purpose of ascertaining "what interest such administratrix had, if any, in the copartnership effects of the firm of Calkins and Darrow," by which judgment it was decreed that the plaintiffs (in this action) had no title or interest in the

lands or real estate described in the complaint in that action, which included the premises sought to be partitioned in this action; that the present plaintiffs were infants and non-residents of the state when the former action was brought, and that they were not legally brought in as parties to that action, and were not bound by the appearance of the guardian *ad litem* for them therein, and that the judgment as to them was without jurisdiction and void. The complaint prayed judgment for partition according to the interests as set forth in the complaint.

The defendants, Calkins, answered the complaint, and among other things alleged that Daniel O. Calkins, at the time of his death, was the sole owner of the lands described in the complaint, and that prior to his death he had fully performed all the terms and conditions contained in the deed of September 25th, 1861, and that upon his death the lands descended to his children and heirs at law, subject to the dower right of his widow. The defendants, Calkins, further set up the judgment rendered in the action brought by the administratrix of Edwin J. Darrow against Daniel O. Calkins in bar of the present action, and also the Statute of Limitations.

On the trial the plaintiffs put in evidence deeds of four parcels of land, comprising forty-eight city lots in the city of Brooklyn, including the premises sought to be partitioned in this action, executed to Daniel O. Calkins and Edwin J. Darrow in the years 1850, 1852, 1853 and 1854. Also the deed of September 25, 1861, from Darrow and his wife to Calkins, hereinbefore referred to. This deed purported to convey to Calkins for the consideration expressed of one dollar, all the right, title and interest of Daniel and his wife in and to the real estate described therein in full and ample terms, as in a deed of bargain and sale, followed by the habendum in the words hereinbefore stated. The plaintiffs further read from the answer of Daniel O. Calkins in the suit brought against him by the administratrix of Darrow (as admissions binding upon the defendants in this action), certain paragraphs for the purpose, among other things, of showing that at the

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time of the commencement of that action, there were assets of the firm in the hands of Calkins (other than the real property of the partnership) sufficient to pay all the debts of the firm and to adjust the accounts as between the partners. The plaintiffs then rested.

The defendants thereupon offered in evidence the judgment roll in the former action brought by the administratrix of Darrow. Its admission was objected to by the plaintiffs on the ground that the judgment in that action was not binding upon them, for the reason that it was rendered before the court had acquired any jurisdiction over their persons. The court sustained the objection and excluded the judgment, except that it was admitted for the single purpose of laying the foundation of a title by adverse possession under the Statute of Limitations. The defendants then gave evidence tending to establish that from the time of the rendition of the judgment of October 31, 1867, Daniel O. Calkins and his children had been in adverse possession of the lands in question, claiming title under the judgment.

The following facts are disclosed by the record in the former action: In general, the action was brought by the administratrix of the deceased partner in the firm of Calkins and Darrow against Calkins, the surviving partner, and certain persons to whom he had contracted to sell certain of the lands conveyed to him by the deed of September 25, 1861, for an accounting of the affairs of the partnership and to have the rights of the respective partners in the partnership property adjudged and determined.

The complaint set out the deed of September 25, 1861; averred that the lands embraced therein were held by Calkins as copartnership property to be by him disposed of as "assets of the firm;" that he had made certain pretended and collusive sales; that no settlement of the partnership accounts had ever been had; that Calkins had neglected and refused to account to the plaintiff as administratrix of Darrow, and in fraud of the partnership was applying the partnership property to his own use, etc.

Calkins, the surviving partner, in his answer denied all allegations of fraud; admitted in substance that the lands held by him under the deed of September 25, 1861, were copartnership property; that upon a settlement of the copartnership business and the sale of the lands and real estate held under that deed, a considerable sum of money would be found to be due to the estate of Darrow; that he was anxious to have a settlement of the partnership business, and near the close of his answer he alleged that he was advised that the interest of Darrow "in the proceeds" of the lands was an interest in lands which, on his death, descended to his two infant children (the present plaintiffs); and (the answer proceeds) "he submits to the court that the children and heirs of said Edwin J. Darrow should have been made parties to this action." After the service of the answer the court on the application of the attorneys for the plaintiff, and on the 15th of October, 1867, made an order amending the summons and complaint by adding the names of the present plaintiffs and defendants, and on the 18th day of October, 1867, made an order for the service of the amended summons upon them by publication, it appearing that they were infants and non-residents of this state and resided at Hartford, Connecticut. On the 22d day of October, 1867, the summons was personally served upon them at Hartford. On the 24th day of October, on the petition of their mother, an attorney of the court was appointed their guardian *ad litem* in this action, who put in an answer submitting their rights and interests to the protection of the court. Thereafter, on the 31st of October, the final decree was entered. By this decree it was among other things adjudged that the interest of Edwin J. Darrow in the lands and real estate and the proceeds thereof, was personal estate and belonged to the plaintiff as administratrix; that the infant defendants (the present plaintiffs) had no title or interest therein as heirs of Edwin J. Darrow; that the assets of the copartnership of Calkins and Darrow, including contracts for the sale of real estate, were worth about twenty-eight thousand dollars, and that the "plaintiff and defendant Daniel O. Cal-

kins, on a full accounting between them as to said estate, having agreed upon the sum of \$14,000 as the present actual value of the interest of the estate of the said Edwin J. Darrow in the said copartnership property," therefore, etc. The decree further provided that the said Calkins pay the plaintiff as administratrix said sum of \$14,000, and that "thenceforward all the estate, rights, interests, property and assets of the said firm shall belong to and be the property of the said Daniel O. Calkins as his own proper goods and chattels and credits, lands and tenements." Calkins paid the \$14,000 as required by the judgment, and entered into possession of all the real estate embraced in the deed of September 25, 1861, not previously sold.

The defense of the Statute of Limitations rests upon the following undisputed facts: (1) Death of Darrow (the ancestor) November 12, 1864. (2) He left two infant children (the plaintiffs). (3) Adverse possession commenced October, 1867. (4) The infant children of Darrow were then nine and eleven years of age respectively. (5) One became of age in 1877 and one in 1879. (6) This action was commenced in June, 1894, twenty-seven years after the commencement of adverse possession and fifteen years after the youngest child became of age.

Charles N. Morgan and *Frederick B. Bailey* for appellants. In the absence of an express or implied agreement to the contrary, real estate, purchased by a copartnership with copartnership funds, is, at all times and for all purposes, real estate, having all the legal qualities and incidents of real estate, including the rights of lienors under judgments, and as such descends to the heirs at law of a deceased partner to the extent of his interest or share therein. (*Buckley v. Buckley*, 11 Barb. 43; *Fairchild v. Fairchild*, 64 N. Y. 471; *In re Coddling*, 9 Fed. Rep. 849; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Story's Eq. Juris.* 1243; *Wilcox v. Wilcox*, 13 Allen, 252; *Shanks v. Klein*, 104 U. S. 18; *Greenwood v. Marvin*, 111 N. Y. 423; *Greene v. Graham*, 5 Ohio, 265; 1 Washb. on Real Prop. 668; *Smith v. Jackson*, 2 Edw. Ch. 28; *Buchan v. Sumner*, 2 Barb. Ch. 165.)

Darrow in his lifetime, and his heirs after his death, were seized in fee of an undivided half part of the premises in question, and the deed from Darrow to Calkins, dated September 25, 1861, did not operate to vest in Calkins the legal title to the one-half part of such premises belonging to Darrow, but at most gave to Calkins a power in trust in respect thereto. (*Van Brunt v. Applegate*, 44 N. Y. 544; *Heermans v. Robertson*, 64 N. Y. 332; *Wright v. Delafield*, 23 Barb. 498; *Cooke v. Platt*, 98 N. Y. 35; *Nicoll v. Walworth*, 4 Den. 385.) The purposes for which the trust had been created in and by the deed of 1861, had ceased prior to the entry of the judgment of 1867, and the legal title to the lands remained in or reverted to the heirs of Darrow, freed from the trust or the execution of the power. (2 R. S. chap. 1, arts. 2, 3, §§ 67, 102; *Greene v. Graham*, 5 Ohio, 264.) The defense of the Statute of Limitations was not proved. (Code Civ. Pro. § 375; *Howell v. Leavitt*, 95 N. Y. 617.) The title and possession of the plaintiffs are sufficient to support the action of partition. (*Weston v. Stoddard*, 137 N. Y. 119.) The trial court did not err in excluding the judgment of 1867 as evidence against the plaintiffs. (*Smith v. Reid*, 134 N. Y. 568; *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84; *Ingersoll v. Mungam*, 84 N. Y. 622; *Crouter v. Crouter*, 133 N. Y. 55.)

Daniel Daly and *William R. Syme* for respondents. The deed of 1861 conveyed the whole estate of Edwin J. Darrow, in the property in question, to Daniel O. Calkins, and all that Edwin J. Darrow retained was a right to a share of the proceeds of the sale of said property. (*Mott v. Richtmyer*, 57 N. Y. 49; 4 Kent's Com. 468; 3 Washb. on Real Prop. 372; *Jackson v. Ireland*, 3 Wend. 100; *Kenney v. Wallace*, 24 Hun, 478; *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Blodget*, 16 Johns. 472; *Patten v. Stitt*, 6 Robt. 431; *Fairchild v. Fairchild*, 64 N. Y. 477; *Shanks v. Klein*, 104 U. S. 18; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Greenwood v. Marvin*, 111 N. Y. 423.) The appellants cannot maintain an action to partition the property described in the

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complaint. (*Harris v. Larkins*, 22 Hun, 488; *McLean v. McLean*, 21 N. Y. Supp. 326; *Morse v. Morse*, 85 N. Y. 53; *Davies v. Davies*, 15 Wkly. Dig. 118; 92 N. Y. 633.) The judgment in the action of *Darrow's Administratrix v. Calkins* would be conclusive upon the appellants even if they had not been made parties thereto. (*MacFarlane v. MacFarlane*, 82 Hun, 238; *Fairchild v. Fairchild*, 64 N. Y. 471; *Greenwood v. Marvin*, 111 N. Y. 423; *Van Aken v. Clark*, 82 Iowa, 263; *Allen v. Withrow*, 110 U. S. 119; *Hoyt v. Hoyt*, 69 Iowa, 174; *Walling v. Burgess*, 22 N. E. Rep. 419; *Parsons on Part.* [14th ed.] 360; *Godfrey v. White*, 43 Mich. 171; *Hollen v. Grimm*, 65 Fed. Rep. 450; *Gallbraith v. Gedge*, 16 B. Mon. 631.) The appellants herein were duly made parties to the action of *Darrow's Administratrix v. Calkins*, and are, therefore, bound by that judgment, and cannot collaterally attack it. (2 R. S. 317, § 2; *Ingersoll v. Mangam*, 84 N. Y. 626; *Croghan v. Livingston*, 17 N. Y. 218; *Gotendorf v. Goldschmidt*, 83 N. Y. 110; *Smith v. Reid*, 134 N. Y. 573; *Bosworth v. Vandewalker*, 53 N. Y. 597; *Murphy v. Shea*, 143 N. Y. 78; *Sloane v. Martin*, 77 Hun, 249; *O'Connor v. Felix*, 87 Hun, 179; 147 N. Y. 614; Code Civ. Pro. § 134; *Staples v. Fairchild*, 3 N. Y. 46; *Porter v. Purdy*, 29 N. Y. 110.) The appellants' remedy, if they were ever entitled to any, is barred by the Statute of Limitations. (Code Civ. Pro. § 88; *Dodge v. Gallatin*, 130 N. Y. 117; *Hoepfner v. Sevestre*, 30 N. Y. S. R. 296; *Miller v. Parkhurst*, 9 N. Y. S. R. 759; *Flint v. Bell*, 27 Hun, 155; 2 Story's Eq. Juris. [13th ed.] § 1520; *Kingsland v. Roberts*, 2 Paige, 193; *Ellison v. Moffat*, 1 Johns. Ch. 46; *Moore v. White*, 6 Johns. Ch. 360; *Raynor v. Pearsall*, 3 Johns. Ch. 578; *Ray v. Bogert*, 2 Johns. Cas. 432; *Phillips v. Prevost*, 4 Johns. Ch. 205.)

ANDREWS, Ch. J. We are relieved on this appeal from the inquiry which frequently arises between copartners and copartnership and individual creditors, whether real estate purchased and conveyed to the copartners during the existence of

the firm, by a conveyance which in form created a tenancy in common, is to be regarded as belonging to them collectively as partnership property, or as the individual property of each according to the interests disclosed on the face of the deed. The finding of the trial court, which is not assailed by any exception, is express, that the lands purchased by Daniel O. Calkins and Edwin J. Darrow were purchased by them as copartners out of the funds of the firm of Calkins and Darrow, and the deed executed by Darrow to Calkins on the 25th of September, 1861, upon which both the plaintiffs and the defendants rely as determining the character of the ownership, expressly declares in the habendum that the lands were partnership property of Calkins and Darrow. We are to assume, therefore, that the lands were originally purchased out of partnership funds, with the intention on the part of each partner that they should be held as partnership property, subject to administration under the rules governing the rights and interests of copartners in lands purchased by them to be held as the property of the partnership. The partners as between themselves made the lands partnership property, and the rights of creditors of the firm or of the individual partners are not involved. The only question here, is between the plaintiffs as heirs of Darrow, and the children of Calkins, and it turns mainly on the question whether upon the death of Darrow in 1864, an undivided half part of the lands to which he acquired the legal title by the deeds running jointly to himself and Calkins, executed between 1850 and 1854, descended to and vested in the plaintiffs as his heirs at law. The plaintiffs at the death of Darrow were infants, and although this action was not commenced until thirty years after his death, nor until fifteen years after the younger of the plaintiffs became of age, it seems, under the case of *Howell v. Leavitt* (95 N. Y. 617) the plaintiffs, although they have slumbered upon their rights during an adverse possession of twenty-seven years, were not barred by the Statute of Limitations. So, also, we think it must be held that they were not barred by the adjudication in the decree of October 31, 1867,

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in the action brought by the administratrix of Darrow against Calkins for the settlement of the partnership affairs, which declared that "they had no title or interest in the said lands and real estate as heirs of the said Edwin J. Darrow, deceased, or otherwise." The service of the summons on the infants by publication was not completed when the judgment was entered, and until the period of publication had expired the court could acquire no jurisdiction to appoint a guardian *ad litem* or to render a judgment binding upon them as parties to the action. (*Brooklyn Trust Company v. Bulmer*, 49 N. Y. 84; *Crouter v. Crouter*, 133 id. 55.)

The legal nature and incidents of land purchased by a copartnership with copartnership funds, is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the cases, come to be, that lands so purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become *ipso facto*, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners *inter se*, as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law. (*Darby v. Darby*, 3 Drewry, 495; *Essex v. Essex*, 20 Beav. 442; Lindley on Part. [3d ed.] 681 *et seq.*) This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor. (*Fairchild v. Fairchild*, 64 N. Y. 471; *Shearer v. Shearer*, 98 Mass. 114.) Lindley, in his work on Partnership, bases the rule on the nature of the interest of each partner in the partnership property. He says (p. 687): "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have

been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." The concluding words of the paragraph quoted concede that the intention of the parties will prevent a conversion where that intention is manifested. The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the Statute of Distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality when it is admitted on all hands that partnership real estate if the necessity arises is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

The clear current of the American decisions supports the rule that in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary

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for these purposes the character of the property is in equity deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the American rule. We refer to a very few of them. (*Buchan v. Sumner*, 2 Barb. Ch. 167; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, *supra*; *Shearer v. Shearer*, *supra*; *Shanks v. Klein*, 104 U. S. 18.)

If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner, his equitable title descends to his heirs or goes to his devisees, but subject to the primary claims growing out of the partnership relation. (*Fairchild v. Fairchild*, *supra*; *Parsons on Part.* § 272.) But the general principles to which we have adverted are those applied by courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject. It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where by such

agreement it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind, so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock and that both together should take the character of personalty for all purposes, and Judge DENIO in *Collumb v. Read* (*supra*) expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained, is conceded by most of the cases. (See *Hoxie v. Curr*, 1 Sumner, 183; *Fall River Whaling Co. v. Borden*, 10 Cush. 462; *Collumb v. Read*, *supra*; *Parsons on Partnership*, § 267.)

The legal title to the real estate which the heirs of Edwin J. Darrow asked to have partitioned in this action was vested in Daniel O. Calkins at the time of the death of Darrow in November, 1864. The plaintiffs on the death of their father took no legal estate in the lands. The legal estate which prior to the 25th day of September, 1861, Darrow held in the undivided one-half of the premises was by the deed executed by him on that day conveyed to Calkins. That this was the effect of the deed we have no doubt. The deed is in terms full and ample to convey in fee the interest of Darrow to his grantee. It was coupled, however, with the declaration on

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the face of the deed, that it was to be held by Calkins as partnership property, and the deed contained a power of management and sale, and this was followed by the significant clause, "and to *pay over* to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall at the closing of the partnership business of said Calkins and Darrow belong to or be due or coming to said Darrow, his heirs, executors, assigns or other legal representatives." The suggestion that the deed attempted to create an express trust in lands, not within the enumerated trusts permitted by section 55 of our statute of "Uses and Trusts" (1 R. S. 728), and was, therefore void as a conveyance, is not well founded. It recognized a pre-existing trust imposed upon the lands, implied by law and arising out of the partnership relation, and that the trust was to continue notwithstanding the conveyance of the legal title. This was not, we think, in contravention of the statute, which contemplated the creation of original trusts, and not the abrogation of existing trusts resulting from or implied by operation of law; nor did it render inoperative the subsequent recognition of such an existing trust in connection with a conveyance of the legal title. We think the legal title to the one-half part of the land passed by Darrow's deed, subject to the performance by Calkins of the trust therein declared. The important question is, whether it operated to convert the partnership lands into personalty, and to change the interest of Darrow, or his representatives, from an interest in the land as realty into an interest in the proceeds of the lands, after a sale thereof by Calkins under the power contained in the deed.

We are of opinion that it was the intention of the partners, disclosed on the face of the deed and by the surrounding circumstances, to substitute in place of Darrow's prior interest in the lands, as such, an interest in him and his representatives in any surplus which should remain after a sale by Calkins and the adjustment of the partnership affairs. It is not necessary to decide whether the surplus, when ascertained, would go to the real or personal representatives of Darrow. As between

Darrow and his representatives, and Calkins and his representatives, the deed operated as a conversion of the lands into personalty. The personal representatives of Darrow were entitled to enforce, in an action for an accounting and an adjustment of the partnership affairs, the claims of Darrow's estate. This was the purpose of the action which resulted in the decree of October 31st, 1867, and we think that decree was binding upon the plaintiffs, not on the ground that they were parties, but for the reason that no controversy existing as to the original character of the property as partnership property, or as to the subsequent dealing between the partners in respect to it, the heirs of Darrow were not necessary parties to a final adjustment of the partnership affairs, including the interest of the Darrow estate growing out of his relation to the lands under the deed of September 25th, 1861. It was open to the plaintiffs on an accounting by the administratrix of the Darrow estate to claim that the \$14,000, received by her under the decree in the action for an accounting, should be regarded as real and not personal assets, and that they were entitled to it in their character as heirs, and not as distributees.

We think the order of the court below reversing the judgment at Special Term was correct, and it should, therefore, be affirmed and judgment absolute entered for the defendants on the stipulation, with costs.

All concur.

Order affirmed, etc. _____

ASA L. ROGERS, as Assignee for the Benefit of Creditors of
THE ROGERS MANUFACTURING COMPANY, Appellant, v.
CHARLES E. PELL et al., Respondents.

1. GENERAL ASSIGNMENT — FOREIGN CORPORATIONS. A corporation of another state has power to make a general assignment for the benefit of creditors under the laws of this state, provided the assignment is also valid under the law of the domicile of the corporation.

2. POWER IN DIRECTORS. When neither statute nor by-law regulating the subject is shown, the power of a foreign corporation to make a general assignment resides in its directors.

3. **PRESIDENT AUTHORIZED TO MAKE ASSIGNMENT.** A resolution by the board of directors of an insolvent foreign corporation, "that the company execute a general assignment," without specifically deputing any one to act, *held*, to authorize its president to make an assignment for the company.

4. **SELECTION OF ASSIGNEE.** The president of a foreign corporation, authorized by the directors to make a general assignment for the company for the benefit of its creditors, has no power to select himself as assignee, in the absence of express authority to that effect. If he does select himself without such authority, his action is not thereby rendered absolutely void, but voidable at the election of the company.

5. **WRONGFUL SELECTION OF ASSIGNEE.** The error of the president of a foreign corporation in selecting himself as general assignee of the company, without express authority, and not questioned by the company, is not available to hostile third parties, such as judgment creditors, except to make use of it upon an application to the proper authority, for the removal of the assignee as a person unfit to discharge the duties of the trust.

6. **WRITTEN ACKNOWLEDGMENT OF ASSIGNMENT.** A written acknowledgment, adequate to meet the requirements of the statutes of this state relating to the subject, is a prerequisite to the passing of title to property covered by a general assignment for the benefit of creditors.

7. **VENUE OF ACKNOWLEDGMENT—QUESTION OF FACT.** Where the venue of an official certificate of acknowledgment of a general assignment made by a foreign corporation names one state and the testimony of an interested witness names another state as the place where the acknowledgment was taken, a question of fact is raised as to the jurisdiction of the certifying officer.

8. **NON-SUBMISSION OF QUESTION OF FACT.** Where a material question of fact is raised by the evidence on a jury trial and the defendant asks to go to the jury thereon, but the court directs a verdict for the plaintiff, and retains the case for further consideration under a stipulation which does not authorize the decision of any question of fact, and thereafter, without having made any findings, grants a motion for a new trial made by the defendant upon the minutes and also dismisses the complaint, subject to an exception taken by the plaintiff and ordered to be heard at General Term in the first instance, the action of the trial court is in effect a nonsuit; and if the General Term overrules the exception and directs judgment for the defendant accordingly, the plaintiff may, on appeal, properly claim error from the failure to submit to the jury any material question of fact raised by the evidence, and may obtain a new trial on that ground.

Rogers v. Pell, 89 Hun, 159, reversed.

(Argued November 23, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered November 19, 1895, upon an order overruling the exceptions

of the plaintiff ordered to be heard in the first instance at General Term, and directing judgment in favor of the defendants.

On the 16th of May, 1893, the Rogers Manufacturing Company, a corporation organized under the laws of the state of New Jersey, but carrying on a lumber yard, as its sole business, in this state, made a general assignment for the benefit of creditors to Asa L. Rogers, the plaintiff in this action. The company had an office in Jersey City, New Jersey, for the purpose of complying with the statute under which it was organized, and on May 15, 1893, its directors, three in number, who also comprised all the stockholders, met at that office and passed a resolution, which, after reciting that the corporation could not pay its debts as they matured and that it was for the best interest of all creditors and stockholders that an assignment should be made, closed in these words: "That the company execute a general assignment of its property and effects without preferences, to a trustee to be nominated by the president of this company." Nothing further appears to have been done by the directors or stockholders, but on May 16, 1893, Asa L. Rogers, president of the company, signed a general assignment, without preferences, running from the company, as party of the first part, to himself as party of the second part. The seal of the company was attached to the instrument, which bore the following signatures: "Asa L. Rogers, president of the Rogers Manufacturing Company." "Asa L. Rogers." "Sealed & Delivered in presence of Fillis H. Benedict, secretary." This paper was executed, delivered and accepted in Jersey City on the day last named, but was filed for record in Kings county, in this state, the next day. The acknowledgment of the assignor and assignee, as certified by the acknowledging officer, were as follows:

"STATE OF NEW YORK, }
"City and County of New York, } ss.:

"On this sixteenth day of May, 1893, before me, the subscriber, personally came Asa L. Rogers, who is, I am satisfied, the president of the Rogers Manufacturing Company, who

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being by me duly sworn did depose and say that he resides in the city of Brooklyn, in the state of New York; that he knows the corporate seal of said company and that the seal affixed to the foregoing conveyance is the corporate seal of said company; that the seal was affixed to the said conveyance by order of the directors of the said company, and that he as president of said company did sign the said instrument by like order of the board of directors.

“GEO. W. CASSEDY,

“*Master in Chancery of New Jersey.*

“STATE OF NEW JERSEY, }
“Hudson County, } ss.:

“I, George W. Cassedy, a master in chancery of New Jersey, do certify that on the sixteenth day of May, eighteen hundred and ninety-three, in the city of Jersey City, in the county of Hudson aforesaid, personally appeared before me Asa L. Rogers, known, and personally known, to me to be the individual described in and who has executed the foregoing instrument, and who acknowledged to me that he had executed the said instrument for the purposes therein mentioned.

“GEO. W. CASSEDY,

“*Master in Chancery of New Jersey.*”

Subsequently the assignee took possession of the property of the company and filed the usual bond, inventory and schedules as required by the laws of this state.

The defendants are the indemnitors of the sheriff of Kings county, substituted in his stead in this action brought by the assignee against him for the conversion of a quantity of lumber formerly belonging to said company and levied upon under legal process issued against it in this state after the assignment was made.

Upon the trial the foregoing facts appeared, and it was also shown that all the property covered by the assignment was situated in this state; that the company had neither assets nor creditors in New Jersey, and that, while compliance with the Insolvent Act of that state was necessary in order that an

assignor should be discharged from his debts, still a corporation could make an assignment for the benefit of creditors valid in that state without complying with the provisions of said act. When both parties rested the defendants asked the court to direct a verdict in their favor, but before the motion was passed upon the plaintiff was recalled and testified that the acknowledgment of the general assignment before the master in chancery was made in Jersey City. Thereupon the defendants moved to dismiss the complaint upon the ground that the assignment was made under a statute of New Jersey, in evidence, which is in the nature of a bankruptcy act, and that no title was conveyed as against subsequent execution creditors; that it was made without authority from the corporation, and that it was not properly executed or acknowledged according to the laws of this state. The motion was denied, the defendants excepted and then asked to go to the jury upon the question whether the acknowledgment was taken in New York or New Jersey, as the only witness to contradict the notary was an interested party. Before this request was passed upon the plaintiff moved that a verdict be directed in his favor. The court thereupon directed a verdict for the plaintiff for \$4,048.91, the value of the property, as conceded, and the defendants having moved for a new trial on the minutes, the plaintiff stipulated that if the same should be granted "the court might either dismiss the complaint or direct a verdict for the defendants with the same force and effect as if made at the end of the case upon the trial, subject, however, to the plaintiff's right to except thereto."

After argument the court granted the motion and dismissed the complaint, allowing the plaintiff an exception, and directed that his exceptions should be heard in the first instance at the General Term, with a stay of entry of judgment in the meantime. The General Term overruled the exceptions and ordered that the defendants have judgment against the plaintiff.

John Larkin for appellant. The assignment was good and sufficient under the laws of this state. (*Vanderpoel v. Gor-*

man, 140 N. Y. 563; Bishop on Insolvent Debtors, § 104; Pollock on Cont. 339; 2 Kent's Com. 459; *Dike v. Erie R. Co.*, 45 N. Y. 113; *Barth v. Backus*, 140 N. Y. 230; *Boese v. King*, 78 N. Y. 471; *Thrasher v. Bentley*, 1 Abb. [N. C.] 39-44.) The assignment was duly acknowledged within the requirements of the General Assignment Act. (L. 1848, ch. 195, § 1; L. 1892, ch. 208; *Kelly v. Calhoun*, 95 U. S. 710; *Lovett v. S. S. M. Assn.*, 6 Paige, 60; *Cunandarqua Academy v. McKechnie*, 19 Hun, 63; *Clafin v. Smith*, 20 Abb. [N. C.] 241; *Ritter v. Worth*, 58 N. Y. 627; *Sheldon v. Stryker*, 42 Barb. 284; *W. P. I. Co. v. Reymert*, 45 N. Y. 703; *Smith v. Boyd*, 101 N. Y. 472; *Carpenter v. Dexter*, 8 Wall. 513; *Merrian v. Haizer*, 2 Barb. Ch. 232; *Kennedy v. Price*, 57 Miss. 77.) The fact that the president of the company nominated himself and acted as assignee does not render the assignment void at the instance of these defendants. (*Sheldon H. B. Co. v. Eickemeyer H. B. M. Co.*, 90 N. Y. 607.)

Henry G. Atwater for respondents Thomson et al. The provision in the New York Assignment Act that the assignment must be duly acknowledged, is mandatory. (L. 1860, ch. 348, § 1; *Cook v. Kelley*, 12 Abb. Pr. 35; 14 Abb. Pr. 466; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Jones v. Bach*, 48 Barb. 568; *Treadwell v. Sackett*, 50 Barb. 440; *Hardmann v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 N. Y. 51; L. 1877, ch. 466, § 2; *Rennie v. Bean*, 24 Hun, 123; *Smith v. Boyd*, 10 Daly, 149; *Camp v. Buxton*, 34 Hun, 511; *Warner v. Juffray*, 96 N. Y. 248; *Franey v. Smith*, 125 N. Y. 44.) An assignment is not duly acknowledged until the assignor has appeared before a proper officer and made a due acknowledgment, and the officer has indorsed on it or annexed to the paper a due certificate of the fact. (*Smith v. Boyd*, 10 Daly, 152; L. 1892, ch. 677, § 15; *Camp v. Buxton*, 34 Hun, 511.) The certificate of acknowledgment of the assignor is defective. (Abbott's New Prac. & Forms, 9, 15; *Thompson v. Burhans*, 61 N. Y. 52; *People ex rel. v. De*

Camp, 12 Hun, 378; *Cook v. Staats*, 18 Barb. 407; *Lane v. Morse*, 6 How. Pr. 394; *Davis v. Rich*, 2 How. Pr. 86; *Sandland v. Adams*, 2 How. Pr. 127; *Snyder v. Olmsted*, 2 How. Pr. 181; *Vincent v. People*, 5 Park. Cr. Rep. 88; *Vance v. Schuyler*, 6 Ill. 160; *Montag v. Lynn*, 19 Ill. 339; *Lovett v. S. S. M. Assn.*, 6 Paige, 60; *Kelly v. Calhoun*, 95 U. S. 710.) Unless the assignment was executed in conformity with the provisions of the New York General Assignment Act of 1877, it did not convey title to tangible property in this state as against attaching creditors. (*Ockerman v. Cross*, 54 N. Y. 29; *Smedley v. Smith*, 15 Daly, 421.) If the assignment was executed under and in conformity with the New Jersey Assignment Act, then no title was conferred as to tangible property in this state as against attaching creditors, because the New Jersey Assignment Act is in effect a bankrupt or insolvent act. (*Barth v. Backus*, 140 N. Y. 230; *Boese v. King*, 78 N. Y. 471; 108 U. S. 379; *Green v. Van Buskirk*, 7 Wall. 139; *In re Waite*, 99 N. Y. 433; *Phelps v. Borland*, 103 N. Y. 406; *Warner v. Jaffray*, 96 N. Y. 248; *Keller v. Paine*, 107 N. Y. 83; *Faulkner v. Hyman*, 6 N. E. Rep. 846; Bishop on Insol. Debtors, § 236; Burrill on Assignments, § 280.) The evidence was sufficient to warrant the trial court in holding that the assignment was a New Jersey assignment. (*Crosby v. Hillyer*, 24 Wend. 280; *Rennie v. Bean*, 24 Hun, 124.) The assignment of Rogers as president of the company to himself, was not a valid exercise of the power conferred on him by the resolution of May 15, 1893, and the assignment was void for that reason. (*Curtis v. Leavitt*, 15 N. Y. 9; *Bank of N. Y. N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 559; *Norton v. S. Nat. Bank*, 102 Ala. 420.)

Thaddeus E. Kenneson for respondents Eppinger et al. The decision of the court in dismissing the complaint was correct. (L. 1860, ch. 348, § 6; *S. B. & N. Y. R. R. Co. v. Collins*, 57 N. Y. 641; *Brennan v. Willson*, 71 N. Y. 502; *Warner v. Jaffray*, 96 N. Y. 249; *Hardmann v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 N. Y. 51; *Nicoll v.*

Spowers, 105 N. Y. 1; *Smith v. Boyd*, 101 N. Y. 472; *Franey v. Smith*, 125 N. Y. 44; *Scott v. Mills*, 115 N. Y. 376.) The acknowledgment of the assignment by Asa L. Rogers, the president of the Rogers Manufacturing Company, was a nullity. He was the grantee in the deed, and also acted as the attorney of the company in executing the assignment and in acknowledging the execution thereof. As grantee he was disqualified to acknowledge the execution by the grantor, and the acknowledgment and the certificate of such acknowledgment are both void. There was, therefore, no evidence that the instrument of assignment was duly acknowledged, and, therefore, no evidence that title passed to the plaintiff. (*Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Armstrong v. Combs*, 15 App. Div. 246; *Wilson v. Traer*, 20 Iowa, 231; *Wasson v. Connor*, 54 Miss. 351; *Hogans v. Carruth*, 18 Fla. 587; *Groesbeck v. Seeley*, 13 Mich. 329; *Laprad v. Sherwood*, 79 Mich. 529; *Hammers v. Dole*, 61 Ill. 307; *City Bank v. Radtke*, 87 Iowa, 363; *Hubble v. Wright*, 23 Ind. 322.) The resolution passed by the board of directors of the Rogers Manufacturing Company did not authorize the making of the assignment in question, and for that reason the assignment is void and a nullity. (*Bank of N. Y. N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 559; *Hardmann v. Bowen*, 39 N. Y. 196; *Boese v. King*, 78 N. Y. 471; *Barth v. Backus*, 140 N. Y. 230.)

Andrew Shiland, Jr., for respondents Pell et al. The assignment is void. (*Hull v. Hull*, 24 N. Y. 647; *F. M. Ins. Co. v. Chase*, 56 N. H. 341; *Bank of N. Y. N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 564; *Wilson v. M. R. Co.*, 120 N. Y. 145; *Neuendorff v. W. M. L. Ins. Co.*, 69 N. Y. 389.) Even if the president had authority to make such an assignment, his authority was limited to an assignment under the laws of New Jersey, and the assignment was, in fact, made there, and must be held to be a New Jersey assignment. (*Barth v. Backus*, 140 N. Y. 234; 6 Thomp. on Corp. § 6267; *Norton v. S. Nat. Bank*, 102 Ala. 420.) The plain-

tiff, having moved for the direction of a verdict in his favor, waived his right to have any questions of fact submitted to the jury, and virtually submitted to the court all questions of fact and law, and the material facts must now be deemed to have been found in favor of defendants by the court, including the facts which the defendants asked to submit to the jury, namely, whether the assignment was intended by the corporation to be an assignment under the New Jersey statute. (*Clason v. Baldwin*, 152 N. Y. 204; *Koehler v. Adler*, 78 N. Y. 287; *Thompson v. Simpson*, 128 N. Y. 284; *Shultes v. Sickles*, 147 N. Y. 704; *Neuberger v. Keim*, 134 N. Y. 35.) The New Jersey Assignment Act is a bankrupt act, and an assignment thereunder is ineffectual to transfer title to property in this state as against a creditor acquiring a lien upon such property. (*Barth v. Backus*, 140 N. Y. 230.) The assignment is invalid under the New York statute, and conferred no title upon the assignee as against a resident attaching creditor. (L. 1877, ch. 466, § 2; *Hardmann v. Bowen*, 39 N. Y. 196; *Smith v. Boyd*, 10 Daly, 149; *M. L. Ins. Co. v. Corey*, 54 Hun, 493; *Irving v. Campbell*, 121 N. Y. 353; *Rennie v. Bean*, 24 Hun, 123.)

VANN, J. The right of the plaintiff to maintain this action depends upon the validity of the assignment purporting to have been made to him by the Rogers Manufacturing Company, which, although incorporated under the laws of another state, had the power to make a general assignment for the benefit of creditors under the laws of this state, provided such assignment was also valid under the law of the domicile of said corporation. (*Vanderpoel v. Gorman*, 140 N. Y. 563.) The validity of that assignment is not questioned on the ground of fraud, but because, as it is alleged, it was made without the authority of the board of directors, was not properly acknowledged and was executed under the insolvent laws of the state of New Jersey, so that it transferred no title as against judgment creditors in this state. (*Barth v. Backus*, 140 N. Y. 230; *Boese v. King*, 78 N. Y. 471.)

The contention that there was a want of authority is based on the allegation that the president was not authorized to execute an assignment to any one, and, least of all, to himself.

As neither statute nor by-law regulating the subject was shown, the power of the corporation to make a general assignment resided in the directors. (*Vanderpoel v. Gorman, supra.*) Hence the president had no authority to execute the instrument in question unless it was conferred upon him, expressly or impliedly, by the resolution adopted by the board. While that resolution does not expressly authorize the president to make an assignment for the company, we think it does so by implication, because it directs "that the company execute a general assignment," and the president, as the executive officer of the corporation, was the one to carry into effect the direction. The corporation could not act for itself, and the nature of the business demanded prompt action. The directors adjourned immediately after the resolution was passed without specifically deputing any one to act for the corporation or themselves in the premises. Under these circumstances, power in the president to act for the directors by carrying into effect their resolution is fairly to be implied.

But, while he had power to select the assignee, he had no power, as against the corporation, to make a selfish use of the trust committed to him by selecting himself in the absence of express authority to that effect. (*Bank of New York v. A. D. & T. Co.*, 143 N. Y. 564; *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145; *Berdell v. Allen*, 2 Silvernail, 449, 452.) The choice of an assignee necessarily involved the exercise of judgment and discretion. It was the duty of the president to make the best choice that he could in the interest of the company and to keep his judgment unclouded by personal interest in order that he might do so. While the assignment was not beneficial to him, as the title was in trust, still he had an interest in his fees and in the importance of a position which involved the control of a large amount of property and the transaction of business of consequence. We think, therefore, that he exceeded his authority, so far as the corporation itself

was concerned. The result, however, did not make his action absolutely void, but voidable at the election of the company. It was the act of a wrongdoer, who could not avoid it himself after it was done, although the party wronged could have avoided it by electing to rescind and acting on the election within a reasonable time after the assignment was made. There is no evidence that the corporation, or any one authorized to act for it, ever sought to rescind or did anything from which an intention to rescind could be inferred, and the period of eighteen months that elapsed between the time of the trial and the date of the assignment was strong evidence of ratification by the company. (*Sheldon Hat Co. v. Eickemeyer Hat Co.*, 90 N. Y. 607; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.) Hostile third parties, such as judgment creditors, could not elect for the corporation nor take any advantage of the president's mistake, except to make use of it upon an application to the proper authority for the removal of the assignee as a person unfit to discharge the duties of the trust.

Under the Assignment Act of 1860 it was held that both the acknowledgment and the indorsement of a certificate thereof were essential to the transfer of title. (*Hardmann v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 N. Y. 51; L. 1860, ch. 348.) The Assignment Act of 1877 requires that every assignment for the benefit of creditors shall be "duly acknowledged before an officer authorized to take the acknowledgment of deeds, and every such * * * assignment shall be recorded." (L. 1877, ch. 466, § 2.) It differs, however, from the preceding act in not specifically requiring that the acknowledgment shall be evidenced by a certificate thereof indorsed on the assignment before delivery. The change was doubtless owing to the fact that the Revised Statutes make provision for the method of taking and certifying acknowledgments by requiring every officer taking an acknowledgment to indorse a certificate thereof, signed by himself, upon the conveyance. (1 R. S. 759.) The position that, since the change in the statute, an oral acknowledgment without certification is sufficient, we regard

as unsound, for the law knows no "acknowledgment," made before a magistrate or notary, unless it is certified. The word, as commonly used by the legislature, the courts and the bar, means both the act and the written evidence thereof made by the officer. (Bouvier's, Burrill's, Black's & Anderson's Law Dict. tit. Acknowledgment. Statutory Construction Act, L. 1892, ch. 677, § 15.) An instrument is not "duly acknowledged" unless there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subject. (1 R. S. 759, § 15; L. 1848, ch. 195; L. 1863, ch. 246; L. 1865, ch. 421; L. 1870, ch. 208; L. 1896, ch. 547, §§ 255 and 258.) The provision requiring every general assignment to be recorded implies that the acknowledgment is to be made and certified in the same way that deeds and instruments of like character are acknowledged before they can be recorded. (Code Civil Pro. § 935.) We think that a written acknowledgment, adequate to meet the requirements of the statutes relating to the subject, is a prerequisite to the passing of title to property covered by a general assignment for the benefit of creditors. (*Warner v. Jaffray*, 96 N. Y. 248, 252; *Smith v. Boyd*, 101 N. Y. 472; *Scott v. Mills*, 115 N. Y. 376, 380; *Franey v. Smith*, 125 N. Y. 44, 49; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9, 19; *Elwood v. Klock*, 13 Barb. 50; 2 Cowen & Hill's Notes, 1247, note 374.)

No question is raised as to the sufficiency of the acknowledgment by Asa L. Rogers, as assignee, but that is quite different from his acknowledgment as the official representative of the assignor, for the latter was the act of the corporation itself. As the venue of that acknowledgment was in this state it is presumed upon its face to have been taken in this state, for the main function of a venue to an acknowledgment is to show where it was made. (*Thompson v. Burhans*, 61 N. Y. 52, 63.) As was said in the case last cited, "Every affidavit should show on its face that it was taken within the jurisdiction of the officer who certifies it." The same rule should be applied to acknowledgments, and it was so applied

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in *Vincent v. People* (5 Parker's Cr. Rep. 88, 101). (See, also, *People ex rel. Crawford v. De Camp*, 12 Hun, 378; *Saril v. Payne*, 24 N. Y. S. R. 486; *Cook v. Stuats*, 18 Barb. 407; *Lane v. Morse*, 6 How. Pr. 394; *Montag v. Linn*, 19 Ill. 399.)

If, however, the acknowledgment in question was taken in this state, it was of no effect, because it was taken by a "master in chancery of New Jersey," an officer who has no power to act in the state of New York. In order to meet this difficulty, the plaintiff, himself, testified, without objection, that the acknowledgment was in fact taken in Jersey City, New Jersey. Thus, we have the official certificate naming one state and the testimony of an interested witness naming another state as the place where the acknowledgment was taken. As the venue is a part of the certificate, a question of fact was thus raised according to our decision in *Albany County Savings Bank v. McCarty* (149 N. Y. 71), where we held that a certificate alone, although not conclusive, is sufficient to make a case for the jury against evidence in rebuttal, whatever it may be. This question of fact has not been decided, although the learned counsel for the defendants asked "to go to the jury upon the question whether this acknowledgment was taken in New York or in New Jersey." No question was submitted to the jury, for the court directed a verdict in favor of the plaintiff, but retained control of the case by consent of both parties for the purpose of further consideration, and under a stipulation authorizing the trial judge, in case he decided to grant the motion of the defendants for a new trial on the minutes, to either dismiss the complaint or direct a verdict for the defendants, with the same force and effect as if made at the proper time during the trial, subject to the plaintiff's right to except. After holding the case from November, 1894, until February, 1895, he granted the defendants' motion for a new trial and dismissed the complaint. Obviously, this did away with the verdict, although the order does not so state in express terms. Necessarily, however, that result follows by implication from the provisions of the order, for not only was a new trial granted, but the complaint

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was dismissed. The stipulation of the plaintiff did not authorize the court, either expressly or impliedly, to decide any question of fact, and the court neither made findings nor intimated in its order that it had passed upon any question of fact. The consent of the plaintiff, that if the defendants' motion for a new trial should be granted, the court might either dismiss the complaint or direct a verdict for the defendants, cannot be construed to embrace any action by the court except such as is specified in the stipulation itself. The court did not direct a verdict for the defendants, and it could not have done so for the jury had been discharged, but it granted the motion for a new trial and dismissed the complaint. Such action, under the circumstances, must be regarded simply as a nonsuit, and not as a decision of the facts in favor of either party, as the Code does not permit a judge to decide questions of fact without findings in writing, general or special, or by directing a verdict, upon the motion of both parties. While the order is inconsistent, in that it both grants a new trial and at the same time dismisses the complaint, still the necessary result is that there was a nonsuit or a mistrial, and, we think, from the form of the order and the stipulation of the parties, that a nonsuit was intended. It follows that a new trial is necessary, for the courts have proceeded to judgment thus far without any decision of the question of fact as to where the assignment was acknowledged. While the defendants, only, requested to go to the jury upon this question, the plaintiff, by excepting to the decision dismissing the complaint in accordance with the right to so except, expressly reserved at the trial, may now properly claim error from the failure to submit that or any other question of fact raised by the evidence to the jury.

We do not announce our conclusion as to any of the other questions discussed by counsel, as, we think, for the reasons already given, that a new trial must be granted in any event.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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167	487

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173	452

ROBERT A. MCGILLIS and JESSIE MCGILLIS, Respondents, v.
EWEN MCGILLIS et al., Respondents; MORRISON M. E. JARVIS and HENRY W. HAYDEN, Impleaded, Appellants.

1. WILL—CONTINGENT REMAINDER. The will of a testator who died in 1848 devised certain lands in this state to a married daughter for life, and in case her husband survived her, to him for life, and then provided that "from and after the decease of both my said daughter and her said husband, I give, devise and bequeath the remainder or fee simple in said property to the lawful issue of my said daughter then living, in such relative proportions (if such issue consist of more than one person) as they would by the laws of the state of New York have then inherited, or taken the same from her, in case she and they were then native-born citizens of said state and she had then died intestate, lawfully seized of said property in fee simple." The daughter and her husband survived the testator, and the daughter, with children, survived her husband. *Held*, in an action of partition subsequent to the daughter's death, that the remainder was contingent, and not vested, until the death of the daughter.

2. DEVISE OF REMAINDER TO ALIENS. The testator was a citizen of the United States; the daughter was born in the United States, but her husband was an alien, and after her marriage she resided in a foreign country, where her children were born. The daughter, having survived her husband, died in 1893, leaving as her surviving issue six children, three born before the death of the testator and three after, and one infant grandchild, the son of a deceased child born after the death of the testator. At the time of the death of the testator's daughter, the provisions of the Revised Statutes (2 R. S. 57, § 4) making void a devise to a person who, at the time of the death of the testator, is an alien, had been changed by chapter 42 of Laws of 1889, so that such provisions no longer applied to the foreign-born children of a married woman born in this country. *Held*, that as there was no outstanding vested remainder in the way of the operation of the act of 1889, it applied to the devise in question; that, under that statute, existing at the time of the death of the daughter, the devised estate, if it had been hers and she had died intestate, would have descended to her children, the infant grandchild taking his parent's portion, which would have been one-seventh of the estate; and, hence, that the infant was seized of an undivided one-seventh interest in the devised premises.

3. NO ESCHEAT WHILE REMAINDER CONTINGENT—NO VESTING BY RELEASE FROM STATE. In an action brought in 1850 for a construction of the will, it was adjudged that the devise to the testator's daughter for life was valid, she not being an alien, but that the devise to her husband and to her children, who were aliens at the time of the death of the testator, was void and that they had no interest in the estate. In a subsequent action of partition, a judgment was rendered directing that the

land devised to the testator's daughter be set off to her for life, with the fee therein to the heirs at law of the testator. In 1887 the Legislature passed a special act (Ch. 310), by which the People released to all the children of the testator's daughter surviving at the time of her death, all the interest of the state in the property, and granted to them all the title which, by escheat, was vested in the People. The children of the testator's daughter who were born before the testator's death then conveyed to her after-born children all their interest in the property, the after-born children agreeing to share equally with them should they succeed in establishing title. Thereupon, the after-born children, as plaintiffs in a cross action against the testator's heirs at law, obtained an adjudication declaring that the remainder was, by force of the act of 1887, vested in the four after-born children, and barring the testator's heirs at law from all title thereto. *Held*, that these adjudications did not affect the above construction of the will, since, in so far as they adjudged the remainder to belong to the heirs at law, the court exceeded its power, and, as the remainder was contingent, nothing could escheat or vest in the state until the life estate terminated, and as, upon the happening of that event general laws intervened, under which the children of the testator's daughter were permitted to take the estate, the state had, in 1887, no estate which it could convey.

4. EFFECT OF FORMER ADJUDICATION. The infant grandchild, the son of a deceased daughter of the testator's daughter born after the testator's death, claimed in the present action that, as his mother was one of the four after-born children, he was entitled to one-fourth of the devised estate, instead of one-seventh, and that he was not bound by her agreement to share equally with the first-born children. *Held*, that this claim was not helped by the judgment in the cross-action, since, although it decided that the share of the grandchild's mother was one-fourth, this share was, under that judgment, subject to her contract, making her resulting share one-seventh.

5. ATTORNEY — EQUITABLE LIEN FOR SERVICES. Prior to the death of the testator's daughter (the life tenant), her children (the remaindermen), including the mother of the infant grandchild, being aliens, contracted with an attorney at law to convey to him a parcel of the devised land, in consideration of his obtaining necessary legislation and conducting litigation to establish their rights as against the testator's heirs at law. The attorney succeeded in his undertaking, and the children thereupon deeded to him the stipulated parcel of land. The infant grandchild was born thereafter. The contract was found to be fair and reasonable. *Held*, that the after-born grandchild was bound by the contract and conveyance to the attorney, on the ground that the attorney had an equitable lien for the services rendered by him for the estate, of which the grandchild had received the benefit, and that the grandchild's interest in the property was subject to such lien.

McGillis v. McGillis, 11 App. Div. 359, modified.

(Argued November 22, 1897; decided January 11, 1898.)

APPEAL, by certification, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 11, 1897, reversing in part and affirming in part an interlocutory judgment in partition, entered upon the report of a referee.

The facts, so far as material, and the questions certified are stated in the opinion.

Henry W. Hayden for plaintiffs and in his own behalf. The question as to what shares Mrs. McGillis' lawful issue would take, upon the termination of her life estate, could not be determined until her death on December 8, 1893, nor could such remainder take effect until her death. (1 R. S. 725, § 29.) The infant Jarvis has no interest in the premises conveyed to Mr. Hayden for his fees and disbursements in the litigations conducted by him. (*Fowler v. Callan*, 102 N. Y. 395.) Assuming for the purposes of this argument that the infant Jarvis owns an undivided interest in said premises conveyed to Mr. Hayden, there is no question but that Mr. Hayden can recover from these surviving covenanting grantors, namely, Mrs. McGillis' six children, under said covenants, whatever it costs him to perfect his title as against said infant Jarvis, that is, to purchase his share therein. (1 Story's Eq. Juris. [11th ed.] § 505; *Low v. Vrooman*, 15 Johns. 238; *Aspinwall v. Sacchi*, 57 N. Y. 335; *Lawrence v. Fox*, 20 N. Y. 268; *In re Hynes*, 105 N. Y. 560.) The appellant, Mr. Hayden, has an attorney's lien under section 66 of the Code of Civil Procedure, upon the share of the estate which he recovered for Mrs. Jarvis, and which has now come into the hands of her son, the infant defendant, Morrison M. E. Jarvis. (*Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521.) An attorney, conducting his case under an agreement to receive his compensation out of the proceeds, has an equitable lien on, or ownership, as equitable assignee in, the proceeds of the action. (*Harwood v. LaGrange*, 137 N. Y. 538; *Boyle v. Boyle*, 106 N. Y. 654; *Chester v. Jumel*, 125 N. Y. 237.)

Henry T. Kellogg, guardian ad litem, for infant *Morrison M. E. Jarvis*, appellant. The defendant *Jarvis* is an owner of a one-fourth of the property to be partitioned. (2 R. S. 57, § 4; *Mick v. Mick*, 10 Wend. 379; *Hall v. Hall*, 81 N. Y. 133; *Marx v. McGlynn*, 88 N. Y. 376; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Beck v. McGillis*, 9 Barb. 45; *Van Nostrand v. Marvin*, 16 App. Div. 28; *White v. Howard*, 46 N. Y. 144; *Brevoort v. Grace*, 53 N. Y. 245; 1 R. S. 722, § 13; *Moore v. Littel*, 41 N. Y. 66; *Nodine v. Greenfield*, 7 Paige, 544.) The Escheat Act of 1887 did not validate the devise to the first three, or give them any rights in this property. (*Van Cortlandt v. Laidley*, 59 Hun, 161; 2 Kent's Com. 61, 541, 555; *Jackson v. Adams*, 7 Wend. 367; *Wilbur v. Toby*, 16 Pick. 177; *Mooers v. White*, 6 Johns. Ch. 365; *Wright v. Saddler*, 20 N. Y. 324; *People v. Conklin*, 2 Hill, 67; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Hall v. Hall*, 81 N. Y. 134; 2 R. S. ch. 1, tit. 2, § 13; *Moore v. Littel*, 41 N. Y. 80; *Lawrence v. Bayard*, 7 Paige, 70; *Campbell v. Stokes*, 142 N. Y. 23; *In re Seaman*, 147 N. Y. 69.) The general act of 1889, in relation to aliens, did not validate that devise or give any interest to the first three. (*Brevoort v. Grace*, 53 N. Y. 245; *White v. Howard*, 46 N. Y. 144; *Baptist Association v. Harts*, 4 Wheat. 1; *Owens v. Missionary Society*, 14 N. Y. 384; *In re McGraw*, 111 N. Y. 112; *Luhrs v. Eimer*, 80 N. Y. 171; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Jackson v. Van Zandt*, 12 Johns. 168; *Sayre v. Wisner*, 8 Wend. 662.) It is *res adjudicata* that the first three took no interest under *Caldwell's* will and the acts of 1887 and 1889. (*Mead v. Mitchell*, 17 N. Y. 210; *Cheeseman v. Thorn*, 1 Edw. Ch. 629; *Clemens v. Clemens*, 37 N. Y. 59; *Brevoort v. Grace*, 53 N. Y. 245; *Brevoort v. Brevoort*, 70 N. Y. 136; *Sheridan v. House*, 4 Keyes, 569; *In re Ryder*, 11 Paige, 185; *Harris v. Strodl*, 132 N. Y. 392.) *Morrison Jarvis* is the owner of a one-fourth interest in the mansion house property, and is not bound to convey the same to *Henry W. Hayden* by virtue of his mother's deed to him, or on account of any equitable lien

claimed by him thereupon for attorney's services. (*Harris v. Strodl*, 132 N. Y. 392; *Bartholmew v. Jackson*, 20 Johns. 28; *Cambreleng v. Graham*, 84 Hun, 550; 1 R. S. 718, § 5; *Sherman v. Wright*, 49 N. Y. 230.)

Marcus T. Hun for Ewen McGillis et al., respondents. The title in remainder did not finally vest under the will of William Caldwell until the death of Eliza McGillis. (*In re Baer*, 147 N. Y. 348; 1 R. S. 723, § 13; *Beck v. McGillis*, 9 Barb. 35; *Van Cortlandt v. Laidley*, 59 Hun, 161.) The adjudications which have heretofore taken place do not estop the children of Eliza McGillis from claiming that the title finally vested on the death of Eliza McGillis. (*Van Cortlandt v. Laidley*, 59 Hun, 161; *Shipman v. Rollins*, 98 N. Y. 311; *Masten v. Olcott*, 101 N. Y. 152.) As the "first four" born children were competent to take, at the date of Eliza McGillis' death, the title passed to them at her death. (*Haynes v. Sherman*, 117 N. Y. 433; *In re Baer*, 147 N. Y. 348; *Lougheed v. D. B. Church*, 58 Hun, 364; *Shipman v. Rollins*, 98 N. Y. 311; L. 1887, ch. 310; L. 1889, ch. 42.) The contract made with Mr. Hayden for the conveyance of the mansion house and grounds to him as compensation for his services in securing the estate in remainder for the McGillis children, is valid as against the Jarvis infant. (*Aspinwall v. Sacchi*, 57 N. Y. 331; *Kent v. Church of St. Michael*, 136 N. Y. 10; Code Civ. Pro. § 66; Pom. Eq. Juris. §§ 1238, 1239; *Benedict v. Gilman*, 4 Paige, 58; *Putnam v. Ritchie*, 6 Paige, 390; *Wetmore v. Roberts*, 10 How. Pr. 51; *Mickles v. Dillaye*, 17 N. Y. 80; *Miner v. Beekman*, 50 N. Y. 337; *Thomas v. Evans*, 105 N. Y. 601; *Shearer v. Field*, 6 Misc. Rep. 189; *McSorley v. Larissa*, 100 Mass. 270.)

HAIGHT, J. This action was brought for the partition of real estate and for the enforcement of a lien by the defendant Hayden on the interests of the infant defendant, Morrison M. E. Jarvis.

William Caldwell died in the year 1848, leaving a last will

and testament, in which he devised certain property in Albany and Warren counties, in this state, to his daughter, Eliza McGillis, for life, and in case her husband survived her, to him for life, and then providing, "From and after the decease of both my said daughter and her said husband, I give, devise and bequeath the remainder, or fee simple in said property, to the lawful issue of my said daughter then living, in such relative proportions (if such issue consist of more than one person) as they would by the laws of the State of New York have then inherited, or taken the same from her, in case she and they were then native-born citizens of said state and she had then died intestate, lawfully seized of said property in fee simple." By another provision he appointed his son-in-law, John McGillis, trustee of the estate devised to his daughter for life, authorizing him to take possession of the property, to receive the rents, issues, interests and profits thereof and to apply the same to the use of his daughter during life. Eliza McGillis was married on the 17th day of May, 1836, to John McGillis, an alien and a resident of Canada, where she resided with him. She survived him and died in the year 1893. At the time of the death of her father, the testator, she had four children, Mary Charlotte, William H., John and Elizabeth, who were aliens. Elizabeth died without issue in 1890. After the death of the testator Eliza McGillis had four more children, Ewen, Margaret Louise, Robert A. and Mary Sophia. Margaret Louise married John H. Jarvis and died intestate on the 1st day of May, 1891, leaving her surviving the infant defendant, Morrison M. E. Jarvis, her only heir at law. It will thus be seen that Eliza McGillis left as her surviving issue six children, three born before the death of the testator and three after, and one grandchild, the son of a deceased daughter. The children born before the death of the testator will be spoken of hereafter as the first-born, and those born after his decease, as the after-born children.

In the year 1850 an action was brought by the executors to obtain a judicial construction of the testator's will. In that

action Eliza McGillis, her husband and her four children then living were made parties defendants. Upon the trial of the action a judgment was entered in which it was adjudged that the devise to Eliza McGillis for life was valid, she not being an alien, but that the devise to her husband and to her children, all of whom were aliens at the time of the death of the testator, was void, and that they had no interest, actual or contingent, in the estate. (See *Beck v. McGillis*, 9 Barb. 35; 2 R. S. 57, sec. 4.) After the termination of this action, another action was brought to partition the real estate in Warren county, in which Mrs. McGillis was made a party, but her children were not. In that action judgment was entered for a partition of the property, directing that the portion devised to Mrs. McGillis be set off to her for life, with the fee therein to the heirs at law of the testator. But no order confirming the report of the commissioners was made or filed.

In 1887 the legislature passed an act, providing as follows: "All the estate, right, title and interest which the people of the state of New York now have or may hereafter acquire, in and to the lands devised by William Caldwell of the city of Albany in this said State of New York, to his daughter Eliza McGillis for life, and then to her husband John McGillis for life, should he survive her, and from and after their decease, to the lawful issue of said Eliza McGillis then surviving, by reason of the alienage of such issue, is hereby granted, released, conveyed and quitclaimed to the said lawful issue of said Eliza McGillis now or hereafter born and their heirs and assigns forever, and they are hereby authorized to take, hold, sell and convey said land and premises, or any interest they or either of them may have therein, in the same manner and with the same effect as if they were citizens of the United States, and had been such citizens at the time of the death of said William Caldwell." (Laws 1887, chap. 310.) The first-born children of Mrs. McGillis then conveyed to her after-born children all their interest in the property in question, the after-born children agreeing to equally share with them in such property should they succeed in establishing their title thereto.

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Thereupon an application was made to the Supreme Court, in behalf of the after-born children, for permission to intervene in the action of *Van Cortland v. Laidlay*, known as the partition action, as plaintiffs in a cross-action against the heirs at law of William Caldwell. This relief was granted, and in that action it was adjudged that the fee or remainder in the property partitioned and set apart to Eliza McGillis for life is "vested in and owned by the lawful issue of the said Eliza McGillis, born subsequent to the death of William Caldwell, and their assigns, in the proportions provided and as specified by the said William Caldwell, deceased, in his said will and codicil, and the said heirs at law of William Caldwell, deceased, and their heirs, devisees and assigns, are hereby forever barred of all title or claim of title thereto, of every name and nature." This judgment was affirmed in the General Term (59 Hun, 161), and subsequently in this court, on consent of the parties, but the infant defendant, Morrison M. E. Jarvis, was not a party to that action.

The interlocutory judgment entered herein adjudges that Morrison M. E. Jarvis is entitled to one-seventh of the property. It is claimed in his behalf that he is entitled to what would have been his mother's portion had she lived; that he takes under the will and not from her; that she being one of the four after-born children he is entitled to one-fourth of the estate, instead of one-seventh, and is not bound by the agreement made by her, to share equally with the first-born children. In determining this question we are somewhat embarrassed by the litigation which has preceded this action. We have, therefore, thought it wise to first consider the question independently of the prior litigation, and then the effect which should be given to the former judgments.

The pivotal question in the case arises upon the construction which should be given to the provisions of the will, and is as to whether the remainder, after the death of the testator, was vested or contingent. In considering this question we must bear in mind the well-settled rule, that if the language of the devise is doubtful, resort should be had to the primary canon

of construction, which is that the intention of the testator, collected from the entire will, must prevail, and the general rules adopted by the courts in aid of the interpretation must give way where their application in a particular case would defeat the intention. If futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute and the time of payment only is postponed, the gift is not suspended, but vests at once. (1 Jarman on Wills, 759; *Warner v. Durant*, 76 N. Y. 136; *Smith v. Edwards*, 88 N. Y. 92-103; *Miller v. Gilbert*, 144 N. Y. 68-73; *Matter of Baer*, 147 N. Y. 348-354; *Matter of Embree*, 9 App. Div. 602-605; affirmed in this court in 154 N. Y. 778.)

Under the statute, future estates are either vested or contingent. They are vested, when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. (1 R. S. 723, section 13.) The statute further provides that "every devise of any interest in real property, to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void." (2 R. S. 57, section 4.) All the children of Mrs. McGillis in being at the time of the death of the testator were aliens; they consequently could not take under the will, and there could be no vesting of the remainder in them. If there was any vesting of the remainder, it necessarily must have been in the heirs at law; for as to the remainder, if vested, he must be deemed to have died intestate, in which case the estate would descend under the statute to the heirs at law. But in cases of doubtful language a person ordinarily will not be held to have intended to die intestate if the provision is fairly and reasonably capable of a different construction.

Upon referring to the provisions of the will, we find that it provides that "from and after the decease of both my said daughter and her said husband, I give," etc. Here we have

the first expression of his intent. He does not make a present gift upon his death, but postpones it from and after the decease of his daughter and her husband. It is true that the words "from and after," standing alone, have often been held not to indicate an intention to postpone the vesting of an estate, especially where it was apparent from the other provisions of the will that a vesting was intended. (*Hersee v. Simpson*, 154 N. Y. 496.) We, therefore, do not rest our conclusion upon these words alone, but consider them in connection with that which follows, from which it appears to us his intention was apparent; he then proceeds—"I give, devise and bequeath the remainder of, or fee simple in, said property to the lawful issue of my said daughter *then* living." In other words, he gives the remainder to the issue of his daughter living at the time of her decease and that of her husband, "in such relative proportions (if such issue consists of more than one person) as they would, by the law of the state of New York, have *then* inherited, or taken the same from her, in case she and they were *then* native-born citizens of said state and she had *then* died intestate, lawfully seized of said property in fee simple." He not only gives to the issue then living, but he leaves the proportion or share which each is to take, to be determined by the laws of the state which shall be in force at the death of his daughter and her husband, providing for its distribution under such laws in the proportion in which it would descend, upon the assumption that his daughter was at that time the owner of the property in fee simple. It was not known at the time of the testator's decease which would survive the other, the daughter or her husband. It was not known and could not then have been ascertained what person or persons would be then living, if any, of the lawful issue. It consequently follows that the person to whom, or the event upon which the estate was limited to take effect, was uncertain, and, therefore, the remainder was contingent. If the remainder were contingent, the heirs at law took no interest in the estate upon the death of the testator. It could not, then, be determined who the heirs at law would

be, or what provisions of the statute would in the meantime be adopted.

We come to a consideration of the rights of the parties when the life estates terminated at the death of Mrs. McGillis in 1893. Upon the happening of that event, the persons who are entitled to take the estate in possession became fixed and certain. In the meantime our statutes had been changed by the adoption of chapter 42 of the Laws of 1889, which provides that "the foreign born children and descendants of any woman born in the United States, and notwithstanding her marriage with an alien and her residence in a foreign country, shall be entitled to take, hold, have, possess, enjoy, convey and devise real estate situated in this state, in the same manner, and to the same extent, and with the same effect, as if such foreign-born children and descendants were citizens of the United States; nor shall the title to any such real estate which has descended or which shall descend, or which has been or shall be devised or conveyed, to such woman or to such foreign-born children or descendants, be impaired or affected by reason of her marriage with an alien, or the alienage of such children or their descendants; provided that the title to such real estate shall be or shall have been derived from or through such woman, or from or through some ancestor of such woman, which ancestor shall be or shall have been a citizen of the United States."

The testator was a resident and a citizen of the United States. Mrs. McGillis was born in the United States; she married an alien and thereafter resided in a foreign country, where her children were born, and the estate came through her ancestor. The case is brought squarely within the provisions of this statute. As we have shown, there was no outstanding vested remainder in the way of its operation and application to the provisions of this will. It, in effect, amends the provision of the Revised Statutes making void a devise to a person who, at the time of the death of the testator, shall be an alien, so that the provisions of that statute no longer apply to the foreign-born children of married women born in

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this country. Under the statute existing at the time of the death of Mrs. McGillis, the estate, if it had been hers and she had died intestate, would have descended to her children, the infant Jarvis taking his mother's portion; his share would consequently have been one-seventh of the estate.

It remains to be ascertained whether the former adjudications affect the result reached by us upon the construction of the will. In the first action it was adjudged that the first-born children of Mrs. McGillis had no interest in the estate, actual or contingent. These children were infants at that time, but are doubtless estopped by the judgment from now bringing in question any matter that was there adjudged and determined which the court then had the power and the jurisdiction to determine. But, as we have seen, upon a proper construction of the will, the remainder was contingent and not vested. It was not, therefore, a devise of property to a person who, at the time of the death of the testator, was an alien, but was a devise to a class of persons who, forty-five years thereafter, would occupy the relation of issue to Mrs. McGillis, and whose identity could not then be ascertained and determined. The first-born children were issue, it is true, but they might not survive their mother, and they might leave children or grandchildren who would, upon her decease, be her issue and entitled to take under the will.

It further appears from the express provisions of the will that such issue was to take, under the laws of the state of New York then in force, such proportion as under the statute they would be entitled to take in case their mother was lawfully seized of the property in fee simple at the time of her decease. The devise was, therefore, subject to and in a measure dependent upon future legislation, the character of which the court at that time could not ascertain or provide for. It could, therefore, only inquire as to the rights of these children under the statutes existing at that time, and such must be understood to be the force and limit of that judgment, and in so far as it adjudges the remainder to belong to the heirs at law the court exceeded its powers.

The first legislation upon the subject, to which reference has been made, contemplates an interest in the estate which has reverted to, and become vested in, the People of the state. This is upon the theory that the provisions of the statute making void the devise of real property to a person who is an alien at the time of the death of the testator, does not apply to the after-born children of Mrs. McGillis; that, at common law, such children could take under the will, although aliens, subject, however, to the interest of the People, to whom the remainder in fee had escheated. (*Wadsworth v. Wadsworth*, 12 N. Y. 376.) By this enactment the People release to all the children of Mrs. McGillis, surviving her at the time of her decease, all of the interest of the state in the property, and grant, convey and quitclaim to them all title which, by reason of the escheat, is vested in the People. It is claimed that this enactment has all the force and effect of a deed transferring the property to the issue of Mrs. McGillis.

It was upon this theory that the cross-action was brought on behalf of the after-born children. As we have seen, the first-born children conveyed their interests to the after-born children, who agreed to share with the former any interest in the property to which they should succeed in establishing title. The property which it is claimed had escheated to the state had, by the enactment referred to, been released and conveyed to the first-born, as well as the after-born, children of Mrs. McGillis. The first-born, therefore, claimed an interest which they could convey, which came from the People of the state, and in that action, based upon the conveyances of the first-born children, it was adjudged that the fee or remainder of the property set apart to Mrs. McGillis for life vested in her after-born issue. Here, it will be observed, by this adjudication we have a vested remainder, but this vesting of the estate comes from the legislature, through whose act the state conveys its escheated interest. Herein arises the confusion in the case. Under the will, as we have construed it, the remainder was contingent, and so remained until the death of Mrs. McGillis, while under the

former adjudication, the estate in remainder had escheated to the People of the state, who in turn had released and conveyed the same to the issue of Mrs. McGillis, who, under the provisions of that statute, took vested remainders. We quite agree with the court in the cross-action, so called, in its construction of the act of 1887, that whatever interest the People had to convey, and which passed under the provisions of that act, vested in the then living children of Mrs. McGillis, subject to open and let in children thereafter born. This conclusion, however, does not help the appellant Jarvis; for as to him the result would be the same; he, instead of taking under the will, upon the death of his mother, took as heir at law her vested interest. This, under the judgment in the cross-action, was a one-fourth interest, but subject to her contract, which she, having a vested interest, had the power to make with the first-born children, or those who survived, with whom she agreed to share the property recovered. We thus have the two titles, one coming through the will, which the act of 1889 validates as to the issue of Mrs. McGillis, and the other through the special act of 1887, which conveys to her children the title of the state, and which is sustained by the judgment in the cross-action. Inasmuch as the same result is reached with reference to the infant's interest in either case, we should not undertake to choose between the two titles were it not for the fact that another question has arisen, which renders such a determination necessary. The judgment in the cross-action was affirmed in this court by consent of the parties. We do not, therefore, regard ourselves as committed upon the question or bound by the adjudication then made, although the parties in that action may be.

The remainder being contingent, nothing could escheat or vest in the state until the life estate terminated. Upon the happening of that event general laws intervened, under which these children were permitted to take the estate in possession. The state, therefore, in 1887, had no estate which it could convey.

The remaining question has reference to the equities of the defendant Henry W. Hayden, as attorney at law, who entered into a contract with the children of Mrs. McGillis, in which Margaret Jarvis, the mother of the defendant Morrison M. E. Jarvis, joined, in which he undertook to establish the title of the McGillis children to the property in question, in consideration of the conveyance to him of a parcel of land known as the mansion house lot. In carrying out this contract he procured from the legislature the passage of chapter 310 of the Laws of 1887, and thereafter instituted the cross-action, to which allusion has already been made, and obtained the judgment therein to which we have referred, establishing the rights of these children to the property, and forever barring the claims of the other heirs at law. A warranty deed of the mansion house property was thereupon executed to him by the children of Mrs. McGillis, including the mother of the defendant Jarvis. After the carrying out of the provisions of the contract and the conveyances aforesaid, the appellant Jarvis was born, and his mother died, and it is now claimed in his behalf that he is entitled to have the mansion house property partitioned, and to recover his share thereof.

The referee, in substance, has found as facts that the infant defendant Jarvis is bound by the agreement and deeds with the defendant Hayden as fully as though he had been of age and a party to them all, they having been made for his benefit and having resulted in securing to him his share of said remainder, and being in all respects just, fair and reasonable; that he has no interest whatever in the premises conveyed to the defendant Hayden by his mother and others in his behalf, as said Hayden's fees for conducting the litigation by which the title of the McGillis issue was established, and which were conveyed to him by the deeds fully set forth in the complaint herein, and that the said defendant Hayden's title to said premises so conveyed to him is perfect as against the infant defendant Jarvis and the lawful issue of Mrs. McGillis as a class, upon facts appearing in the record of this case; and also that the defendant Hayden has an attorney's lien

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upon the premises conveyed to him as and for his fees, and that, if the defendant Jarvis had any interest in the premises, such interest would be subject to be defeated by the attorney's lien.

The Appellate Division reversed the judgment of the referee in so far as it established the title of Hayden to the mansion house property; but in its opinion it is stated that the services of Mr. Hayden innred to the benefit of the defendant Jarvis; that the agreement made by the children of Mrs. McGillis, to convey to him the mansion house property in consideration for such services, was fair and equitable, and that they felt inclined, if possible, to sustain the conclusions of the referee in reference thereto; that they, however, had with reluctance reached the conclusion that it was beyond the power of the parties who made the contract to convey or affect the interests of the defendant Jarvis, and that Hayden had no claim for legal services as against him which could be enforced at law.

If the mother of the defendant Jarvis took a vested remainder from the state through the provisions of chapter 310 of the Laws of 1887, she had the power to sell and convey, or to contract with reference to the same; and upon her death her son would take through her, subject to the contract which she had made. But this situation has not met with our approval, as we have already indicated. There is, however, another view upon which we think the claim of Hayden may properly be sustained. In the first place we have the citizen and resident heirs at law making claim to this property as against these alien children and issue of Mrs. McGillis. Mrs. McGillis was becoming aged and liable to die, and her children were aliens. Under the will, distribution was to be made according to the laws of the state which should then be in force. If her children were to take under the provisions of the will, it was apparent that legislation was necessary. It was under these circumstances that the services of Hayden were contracted for. The mother of the defendant Jarvis was at that time one of the living issue of Mrs. McGillis and represented one

of the class of issue referred to in the will. She joined in the contract with Hayden, and in so doing she claimed to represent, not only her own interest, but that of her children who should thereafter be born to her. While such after-born child may not be bound under the doctrine of representation, for the reason that Mrs. Jarvis had no vested interest, under the authority of *Kent v. Church of St. Michael* (136 N. Y. 10) we think he may be bound upon the theory that Hayden had an equitable lien. As we have already shown, legislation was not only necessary, but an adjudication disposing of the claims of the heirs at law was also thought advisable. Hayden undertook the securing of this property for distribution, under the will of the testator to Mrs. McGillis' issue. He was successful in his efforts, and the McGillis issue, as a class, then living, united in his payment by conveying to him the mansion house property. The appellant Jarvis was after born, but he receives the benefit of the services rendered for the estate. If Hayden had expended money in the repairs and preservation of the property, under the circumstances there would be no doubt about the power of equity to reimburse him out of the property. (*Putnam v. Ritchie*, 6 Paige, 390; *Ford v. Knapp*, 102 N. Y. 135; *Cosgriff v. Foss*, 152 N. Y. 104-108.)

In 2 Story on Equity, at section 1237, it is said: "Courts of equity have not confined the doctrine of compensation or lien for repairs or improvements to cases of agreement or of joint purchases; they have extended it to other cases where the party making the repairs and improvements has acted *bona fide* and innocently, and there has been a substantial benefit conferred upon the owner so that, *ex æqua et bona*, he ought to pay for such benefits."

Is the situation changed by reason of his having spent money and time in preserving the property to these children from the claims of others? It seems to us that the principle is the same, and that the equities which control in one case should be recognized in the other. The contract having been found to be fair and reasonable, it follows that the equitable

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lien of the defendant Hayden equals the distributive share of the infant Jarvis in the mansion house property, and that the said Jarvis consequently has no interest therein to be partitioned.

The questions submitted for our determination, with the answers which are given thereto, are as follows:

First. Whether the infant defendant, Morrison M. E. Jarvis, is seized of and owns an undivided one-seventh, or an undivided one-quarter interest in the premises sought to be partitioned herein. Answered, one-seventh.

Second. Whether the infant defendant, Morrison M. E. Jarvis, owns an undivided one-seventh interest, or an undivided quarter interest, or any interest whatsoever in the premises conveyed to the defendant Henry W. Hayden for his fees, subject to a lien in law or equity in favor of the defendant Henry W. Hayden. Answered, it is subject to a lien in equity.

Third. Whether the defendant Henry W. Hayden has or has not a perfect title, as against said defendant Morrison M. E. Jarvis, to the premises conveyed to him for his fees. Answered, he has a good title.

Fourth. Whether the infant defendant, Morrison M. E. Jarvis, out of his interest in the premises sought to be partitioned herein, ought equitably to contribute ratably toward the reasonable fees and expenses of the defendant Henry W. Hayden for the services rendered by him in establishing the title of the lawful issue of Eliza McGillis as a class as against the heirs of William Caldwell to the said premises sought to be partitioned herein. Answered, he should.

The order of the Appellate Division, in so far as it reverses the judgment entered upon the report of a referee, should be reversed, and the judgment as entered upon the report of the referee affirmed, with costs to all parties payable out of the estate.

All concur, except O'BRIEN, J., who dissents from the proposition that there is a lien upon the estate of the unborn infant, and BARTLETT, J., not sitting.

Judgment accordingly.

154	550
154	568
154	550
e166	78
e166	74
166	76

In the Matter of the Application of THE GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO in Relation to Michigan Street.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and THE GRADE CROSSING COMMISSIONERS, Appellants; JAMES W. WADSWORTH et al., Respondents.

1. CITY OF BUFFALO—GRADE CROSSING ACT—AWARD FOR INJURY FROM CHANGE OF GRADE OF STREET. Under the provisions of the Grade Crossing Act of the city of Buffalo (L. 1888, ch. 345, § 12, amd. L. 1890, ch. 255) which authorize the grade crossing commissioners to procure the appointment of commissioners of award when they have decided that the grade of a street shall be changed and that any property may be injured by the improvement "for which the owners or persons interested therein are lawfully entitled to compensation," an injury to property by change of grade of the street (as, by an overhead viaduct) may be the subject of an award to the owners or persons interested, although the property is not actually taken.

2. "LAWFULLY ENTITLED TO COMPENSATION." This is so, even on the assumption that the words "are lawfully entitled to compensation" refer to such right of compensation as was already authorized by existing laws and did not create any new right, since at the time of their enactment abutting property owners were lawfully entitled, under the city charter, to compensation for injuries caused by a change of street grade, when made by the city.

Matter of Grade Crossing Commissioners, 17 App. Div. 54, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 28, 1897, affirming an order made at Special Term confirming the report of commissioners appointed to assess the damages to property injured by a change of the grade of Michigan street in the city of Buffalo.

This proceeding was instituted under chapter 345 of the Laws of 1888, as amended by chapter 255 of the Laws of 1890, and chapter 353 of the Laws of 1892, known as the Grade Crossing Act of the city of Buffalo, to procure the appointment of commissioners to ascertain and report the

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Points of counsel.

compensation to be paid to the owners and parties interested in certain lands injured by the construction of a viaduct over the tracks of the New York Central & Hudson River Railroad Company as they cross Michigan street in said city. The facts, so far as material, appear in the opinion.

Spencer Clinton for the grade crossing commissioners, appellant.

Charles A. Pooley for New York Central and Hudson River Railroad Company, appellant. An appeal lies in the Court of Appeals from the order and judgment appealed from. (Code Civ. Pro. § 190, subd. 1; *People ex rel. v. Campbell*, 152 N. Y. 51; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 526; *In re De Camp*, 151 N. Y. 557; *McMahon v. Rauhr*, 47 N. Y. 72; *R. & S. R. R. Co. v. Davies*, 43 N. Y. 137; *In re L. I. R. R. Co.*, 45 N. Y. 368.) No portion of the respondent's property was taken. The construction of the viaduct within the lines of Michigan street constituted a change of grade of the street, and the owners of property fronting on the street are not lawfully entitled to compensation for resulting consequential damages. The commissioners, therefore, had no jurisdiction to award damages. (*Talbot v. N. Y. & H. R. R. Co.*, 151 N. Y. 155; *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 170; *In re Grade Crossing Comrs.*, 6 App. Div. 327.)

Herbert P. Bissell for James W. Wadsworth, respondent. The Grade Crossing Act conferred jurisdiction upon the commissioners to award damages to the respondents. (*In re Grade Crossing Comrs.*, 6 App. Div. 327; *Newman v. M. E. R. Co.*, 118 N. Y. 618.) The Grade Crossing Act also provides for compensation being awarded, even if the structure erected is a change of grade. (L. 1888, ch. 345, § 12; L. 1890, ch. 255, § 9.) The appellate court will not interfere with the report of the commissioners to correct the amount of damages awarded except in cases of gross error showing prejudice or corruption. (Mills on Em. Dom. § 246;

In re U., C. & S. V. R. R. Co., 56 Barb. 456; *T. & B. R. R. Co. v. Lee*, 13 Barb. 169; *In re G. El. R. Co.*, 38 Hun, 438; *In re B. El. R. R. Co.*, 55 Hun, 165; *In re N. Y. C. & H. R. R. R. Co.*, 64 N. Y. 60; *In re N. Y., L. E. & W. R. R. Co.*, 99 N. Y. 388; *In re N. Y., L. & W. R. R. Co.*, 27 Hun, 116.)

Emory P. Close for Charles I. Baker, respondent. No appeal lies to this court from the order of the Appellate Division and judgment entered thereon affirming the order of the Special Term confirming the report of the commissioners herein. (*In re S. B. R. R. Co.*, 141 N. Y. 532; *In re S. B. R. R. Co.*, 143 N. Y. 253; *In re Comrs. of State Reservation at Niagara*, 102 N. Y. 734; *In re B. El. R. R. Co. v. Flynn*, 147 N. Y. 344.) The appraisal proceedings herein were authorized by the Grade Crossing Act. (*In re Grade Crossing Comrs.*, 6 App. Div. 327; *Folmsbee v. City of Amsterdam*, 142 N. Y. 122.) By the charter of the city of Buffalo, abutting property owners are lawfully entitled to damages occasioned by a change of grade. (L. 1891, ch. 105, § 406; 2 Dillon on Mun. Corp. § 587; Lewis on Em. Dom. 213, § 108; 2 R. S. [8th ed.] 1387, 1388.)

VANN, J. This appeal arises under an act of the legislature entitled "An act to provide for the relief of the city of Buffalo and to change and regulate the crossing and occupation of the streets, avenues and public grounds in said city by railroads." (Laws of 1888, ch. 345, as amended by ch. 255 of the Laws of 1890, and ch. 353 of the Laws of 1892.) The object of this act was to do away with grade crossings through the action of the city in co-operation with the railroad companies centering in or passing through the same. The agency adopted to accomplish this object was a commission, composed of ten citizens of the county of Erie, known as grade crossing commissioners, who were clothed with varied and extensive powers. Their first duty was to prepare a general plan for the improvement; but, before it was finally

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adopted, they were required to give the railroad companies a hearing, at which witnesses could be called by them and by the city to testify as to the feasibility and expediency of the proposed changes. Upon adopting the plan, the commissioners were authorized to carry it out by contracting with the railroad companies as to the amount of work to be done by them and by the city or as to the proportion of the expense to be paid by each. If no agreement was made, the commissioners could proceed by compulsion through the Supreme Court to apportion either the work or the cost thereof between the city and the companies, and to compel the latter to perform or pay their share as the case might be. The part of the expense that fell upon the city was to be met by general taxation. Power was conferred to acquire lands, to close, discontinue, widen or change the grade of any street, and to ascertain the damages sustained by any person by reason thereof, through commissioners appointed by the courts. Other general powers and duties were to be exercised or performed by the grade crossing commissioners, but mention of them is not essential to a proper understanding of the question that we are called upon to decide. That question arises under section twelve of the act which provides that "if the commissioners shall decide that it is necessary for the purpose of carrying out any plan * * * adopted by them, that any street shall be closed or discontinued, or that the grade of any street or portion of any street * * * shall be changed, and that any property may be injured thereby for which the owners or persons interested therein are lawfully entitled to compensation, or that any land shall be taken incident to the changes of the grade of any street, * * * the commissioners, by their chairman, may apply to a Special Term of the Supreme Court for the appointment of three commissioners to ascertain the compensation therefor to be paid to the owners of, or parties interested in, the lands proposed to be taken, or which may be injured." After making provision for the nature of the petition and service thereof upon "each person named therein as an owner of, or interested in the

lands," and for the trial of any issue raised by answer or demurrer, the section further provides that, "if no answer or demurrer to the petition is filed or if the issue upon an answer or demurrer is decided against the person filing the same, the court shall appoint three disinterested freeholders of the city of Buffalo commissioners to ascertain and report the just compensation to be paid to the owners of and parties interested in the lands for taking the same or for the injury thereto. * * *

The commissioners, so appointed, are empowered to issue subpoenas and are required "to hear the proofs and allegations of the parties and report the evidence taken before them together with their decisions of the amount of compensation to be paid to the owners" of lands taken, "or if the lands are not taken, the amount to be paid for injury thereto by carrying out the proposed plan, and " to "designate to whom such compensation shall be paid and in what sums, according to their respective interests." Provision is made that, upon the filing of their report, any party interested may move the court for confirmation thereof, and, upon confirmation, the court is directed to "fix the amount of damages, costs and expenses allowed by law to be allowed the landowner and the petitioner, and shall order the same to be paid by the railroad or railroads interested and the city as and in such proportion as shall have been fixed by the commission, or by the agreement provided for in section nine. * * *

Upon such payment * * * being made by the city, the fee of the lands sought to be taken shall vest in the city, and all claims for damages to the property claimed to be injured shall be extinguished."

An appeal may be taken by either party from the report of the commissioners and the order of the Special Term confirming such report, to the Appellate Division of the Supreme Court, which is required on such appeal to examine the proceedings before the commissioners and to affirm, modify or reverse the order of the Special Term and such report, and in case of reversal to remit the proceedings to the same or to new commissioners to be appointed by the Special Term "and their report shall be final."

At the time this proceeding was commenced, Michigan street, in the city of Buffalo, running substantially north and south, crossed at right angles and at grade the tracks of the New York Central & Hudson River Railroad Company, as well as Exchange street next to the north and the Hamburg canal next to the south. The general plan adopted by the grade crossing commissioners for the improvement in Michigan street provided for the construction of a viaduct over the railroad tracks fifty-six feet wide, forty-two feet thereof to be used as a roadway, and seven feet on each side for sidewalks. The approaches were to be built of iron and stone and the erection over the tracks of iron only. The entire structure beginning at grade on the south was to reach a height of thirteen feet over Exchange street, which was to be lowered one foot, and fifteen feet over the railroad tracks, and then to gradually reach grade again on the north. The length of the approaches was to be such as to make an easy ascent on one side and an easy descent on the other for the use of persons walking or driving.

After the city had built the viaduct, the grade crossing commissioners commenced this proceeding, alleging in their petition that they had decided that, in order to carry out their general plan, it was necessary to change the grade of Michigan street as therein provided, "and that the property known as the Continental Hotel * * * may be injured, for which the owners or parties interested therein are lawfully entitled to compensation." A description of the premises was given, with the names of the owners and parties interested therein. Upon due notice to them and to said railroad company an order was made by the Special Term, which, after reciting the foregoing facts in substance, appointed three commissioners "to ascertain and report the amount of compensation to be made to the owners and parties interested in the land hereinabove described for injury thereto by carrying out the proposed plan" and to "designate to whom such compensation shall be paid and in what sums according to their respective interests."

Upon the trial it appeared that certain property known as the Continental Hotel, specifically described in the petition, was situated on the southwest corner of Exchange and Michigan streets, with a northerly frontage of two hundred and ten feet on the former, and an easterly frontage of one hundred and ten feet on the latter; that the entire lot, except an alley ten feet wide running from Michigan street to the New York Central station, was covered by the hotel building four stories in height, and that the land upon which the tracks of the railroad company are located adjoins the hotel property on the south. The commissioners awarded \$59,700 to James W. Wadsworth as owner; \$31,889 to Charles I. Baker as lessee of said hotel, and \$1,359 to Jabez H. Peterson and another as lessees of a store under the hotel. No part of this property was actually taken in order to make the improvement, but the viaduct above described was immediately in front of the large building on the lot, and was so situated as to interfere with its light, air and access.

Although no answer was served by the New York Central and Hudson River Railroad Company, it filed exceptions to the report, but upon motion of the grade crossing commissioners, after due notice to all concerned, an order of confirmation was made by the Special Term which upon appeal was affirmed by the Appellate Division. Both the railroad company and the grade crossing commissioners appealed to this court, but the latter in their points state that the object of their appeal was to answer any claim that the appeal of the railroad company was not properly taken, as well as to protect the interests of the city.

As the grade crossing commissioners decided, before commencing this proceeding, that the grade of Michigan street should be changed, and that the property of the respondents might be injured thereby, as permitted by section 12 of said act, the question as to the status of the respondents, if that decision had not been made, is not involved in this appeal. That question led to a division of opinion among the learned judges of the Appellate Division in the third department,

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but we are not now called upon to consider it. (*Matter of Grade Crossing Commissioners*, 6 App. Div. 327.) The only question which the learned counsel for the appellants ask us to decide in this proceeding is, whether the commissioners had jurisdiction to award compensation for the consequential damages resulting from the construction of the viaduct in Michigan street, inasmuch as no part of the respondents' property was taken. The position of the railroad company is that the commissioners had no jurisdiction to make an award, because there is no statute authorizing it, and that in the absence of such a statute there can be no recovery against a city for changing the grade of a street, according to many carefully considered cases. (*Talbot v. N. Y. & Harlem R. Co.*, 151 N. Y. 155; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118; *Rauenstein v. N. Y., L. & W. R. Co.*, 136 N. Y. 528; *Ottenot v. N. Y., L. & W. R. Co.*, 119 N. Y. 603; *Conklin v. N. Y., Ontario & W. R. Co.*, 102 N. Y. 107.)

On the other hand, the respondents claim that the improvement involved not simply a change of grade, but the erection of a structure similar in character to that of an elevated railroad, as that part of Michigan street adjacent to the property in question is left open and accessible to use the same as before, except in so far as it is occupied by the iron columns which support the viaduct, and is absolutely closed at the line of the railroad property; that the right of an abutting owner to compensation for damages under such circumstances is established by the principle underlying the *Story* case, and many other familiar decisions relating to the liability of elevated railroads for interference with light, air and access (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Newman v. Met. El. R. Co.*, 118 N. Y. 618, 625; *Bohm v. Met. El. R. Co.*, 129 N. Y. 576); that the *Talbot* and other cases relied upon by the appellants have no application because they were begun by landowners for affirmative relief, while this proceeding was begun by the grade crossing commissioners themselves, to assess the damages caused to the real estate in question by the construction of the viaduct, and that not only by the common law, but by the act

under consideration, as well as the charter of the city of Buffalo, the respondents, as abutting owners, were "lawfully entitled to compensation," even for a mere change of grade.

Whether the legislature intended by the Grade Crossing Act to confer jurisdiction to assess damages caused, not by actually taking land, but by injuring land not taken, was thoroughly discussed before us. If the attention is confined to the language of section twelve, where it says, in substance, that if the commissioners shall decide that any property may be injured by the improvement "for which the owners or persons interested therein are lawfully entitled to compensation," such property may be the subject of an award, an intent may be inferred to give such compensation only as was already authorized by existing laws, and not to create any new right or to impose any new liability. Yet the fact that when the commissioners decide that certain property may be injured, and themselves institute the proceeding, making the owners of such property parties, full compliance with the provisions of the section extinguishes "all claims for damages to the property claimed to be injured," tends to indicate an intention on the part of the legislature to recognize the right of the landowner to compensation for the injury done to his property in carrying out the general plan. Moreover, the broad purpose of the statute, when the title and all the sections are read together, the public nature of the evil to be remedied, the general benefit to be conferred by the improvement, and the general charge upon all the taxable property for the expense thereof, so far as it falls upon the city, should not be lost sight of. A literal construction of the words "are lawfully entitled" would lead toward the meaning that the owner must be entitled to compensation when the act was passed, while a liberal construction of those words in connection with the entire act, which recognizes the fact that lands may be injured as well as taken, would lead toward the meaning that the owners of lands injured by the act "are lawfully entitled" to compensation under the act.

While we suggest, we do not decide this question, as it has

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caused some difference of opinion among the members of the court, and we prefer to base our decision upon grounds that are satisfactory to all.

It is provided by section 406 of the charter of the city of Buffalo that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration. Upon presentation of such claim, the board of aldermen shall refer it to the board of assessors. The board shall hear the claimant and award such damages as shall be just. In case the board shall award damages to any person, it shall assess the same upon the real estate benefited by the alteration. The amount so assessed shall, when collected, be paid to such claimant." (Laws of 1891, ch. 105, § 406.) This was a substantial re-enactment of section 17, title 9, chapter 519 of the Laws of 1870, which is said to have been passed to relieve property owners in the city of Buffalo from the hardship of the rule laid down in the *Conklin* and kindred cases, that a change of grade upon a highway when duly authorized invades no private right. Upon the assumption, therefore, that the words "lawfully entitled to compensation," as used in section 12 of the Grade Crossing Act, refer to the right to compensation according to the common law or to statutes in force when that act was passed, still it is clear that at that time property owners were lawfully entitled to compensation under the city charter for injuries caused by a change of grade, when made by the city. The learned counsel for the railroad company contends that while the charter gives the property owner the right to claim damages, it leaves to the board of assessors the power of determining whether compensation shall be awarded, and if so to fix the amount.

It is doubtless true that the assessors must find as a fact that the lands have been actually injured before they can award any damages. The command of the statute is that "the board shall hear the claimant and award such damages as shall be just," and "in case" they make an award, the

amount thereof shall be paid to the claimant. Just damages can be based only upon the fact of injury found upon evidence tending to show injury done. This leaves nothing to the discretion of the assessors. They are to find or refuse to find the fact upon common-law evidence, which leaves no more discretion to them than to any tribunal required to pass upon a question of fact. When this fact is once found in favor of the landowner, his right to recover and the duty of the city to pay adequate compensation is absolute and is not affected by the method provided for raising the money. While the section does not in so many words say that the city shall be liable for any damages caused by changing the grade of a street, the right to such damages follows by necessary implication from the duty cast upon the assessors of passing upon the claim and awarding such damages as shall be just, and the further duty cast upon the city of paying the amount so awarded to the owner. The case of *Reining v. N. Y., L. & Western R. Co.* (128 N. Y. 170), relied upon by the appellants, instead of aiding them, aids the respondents. In that case damages were recovered by the abutting owner in an action at law from a railroad company for constructing its road on an embankment in one of the public streets of the city of Buffalo. So far as said provision of the charter was considered, it was held to afford a remedy for damages from changes of grade where no right to damages existed before; that it did not so apply to the case then in hand as to confine the claimants to the statutory remedy provided against the city, and that the common-law remedy for the injury was not cut off by the provision of the charter. It was also held that the embankment was not a change of grade within the meaning of the charter provision, which was designed to afford a new remedy and not to interfere with an old one, but was practically and substantially the closing of the street for ordinary uses. That case, therefore, not only recognizes the right of the owner to recover damages under the charter for a change of grade, but also holds that he has a right to recover his damages at common law when the alteration was not a

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mere change of grade, but a substantial appropriation of the street by a permanent structure.

We think that the respondents were lawfully entitled to compensation, under the provisions of the city charter, for any injury to their property caused by the change of grade, if it may be called such, and that, therefore, the commissioners appointed under the Grade Crossing Act had jurisdiction to assess the damages, which, when confirmed by the court and ordered paid by the railroad and the city in such proportions as were fixed by the commission, became final and binding obligations upon those corporations respectively, enforceable in the usual way.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

In the Matter of the Application of **THE GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO** in Relation to Main Street.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant; **THE GRADE CROSSING COMMISSIONERS** and **BETSEY A. WALKER et al.**, Respondents.

CITY OF BUFFALO — GRADE CROSSING ACT — COMMISSIONERS OF AWARD FOR INJURY FROM CHANGE OF GRADE. Under the Grade Crossing Act of the city of Buffalo, the power to measure and determine the injury, as well as to award compensation, is vested in the commissioners appointed by the court on the application of the grade crossing commissioners; and their appointment cannot be refused on the ground that the injury to abutting property, not actually taken, by a change of street grade (as, by carrying the street over a railroad subway), is apparently slight and the damages apparently of little consequence.

Matter of Grade Crossing Commissioners, 21 App. Div. 633, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 27, 1897, affirming an order made at Special Term overruling a demurrer to a petition of the grade crossing com-

missioners of the city of Buffalo, asking for the appointment of commissioners to ascertain the just compensation to be paid to the owners of lands injured by changing the grade of Main street in said city under chapter 345 of the Laws of 1888, as amended by chapter 255 of the Laws of 1890 and chapter 253 of the Laws of 1892, and appointing commissioners for the purpose aforesaid.

Charles A. Pooley for New York Central and Hudson River Railroad Company, appellant. An appeal lies to the Court of Appeals from the order of General Term appealed from. (*People ex rel. v. Campbell*, 152 N. Y. 51; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 526; *In re De Camp*, 151 N. Y. 557; *McMahon v. Rauhr*, 47 N. Y. 72; *R. & S. R. R. v. Davis*, 43 N. Y. 137; *In re L. J. R. R. Co.*, 45 N. Y. 368.) The court has no jurisdiction herein to award consequential damages or appoint commissioners for that purpose; the improvement consists merely in a slight change of grade of the street, and for this the owners of lands fronting on the street are not lawfully entitled to compensation. (*Talbot v. N. Y. & H. R. R. Co.*, 151 N. Y. 155; *Talbot v. N. Y. & H. R. R. Co.*, 78 Hun, 473; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118; *Ottenot v. N. Y., L. & W. R. Co.*, 119 N. Y. 603.)

Spencer Clinton for the grade crossing commissioners, respondent.

John G. Milburn for Charles Berrick, respondent. The order is not appealable. (Code Civ. Pro. § 190, subd. 2.) This proceeding is authorized by the Grade Crossing Act. (L. 1888, ch. 345, § 12; L. 1890, ch. 255, § 9; *In re Grade Crossing Comrs.*, 17 App. Div. 54; L. 1870, ch. 519, § 17; *Ottenot v. N. Y., L. & W. R. Co.*, 119 N. Y. 603; L. 1891, ch. 105, § 406; *Bauman v. Ross*, 167 U. S. 590.)

Frank C. Ferguson for Betsey A. Walker, respondent. The Grade Crossing Act itself allows compensation to be made

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to an abutting owner for the injury that he has suffered by a change of grade of the street. (L. 1888, ch. 345, § 12; *In re Grade Crossing Comrs.*, 17 App. Div. 54; *In re Grade Crossing Comrs.*, 6 App. Div. 327.) The charter of the city of Buffalo provides expressly for such compensation. (L. 1891, ch. 105, § 406; *In re Grade Crossing Comrs.*, 6 App. Div. 327.) It is to be noticed that the grade crossing commissioners are not given power to decide that the abutting owners are entitled to recover damages. They are only authorized to decide, and they only have decided, that the property of such owners may be injured by the proceeding; and upon that decision they have obtained the order creating a proper constitutional tribunal to pass upon the questions of damage and amount of damage. This order is warranted in law. (*Bauman v. Ross*, 167 U. S. 590.)

VANN, J. In this case no land was taken for the improvement and no overhead structure was erected, but an excavation was made across Main street in the nature of a subway, in which the tracks of the railroad were laid. The excavation was covered with steel beams, upon which a paved passageway was built for use as a street. This alteration, according to the plan adopted by the grade crossing commissioners, required the grade of Main street "to be changed over the beam tunnel, commencing at a point about one hundred and fifty feet south of the tracks" of the railroad company; "thence on a four per cent grade to the tracks at an elevation of 1.67 above" the former "grade of the street; thence to a point about fifty feet north of the tracks where it meets the old grade of the street." The improvement does away with a dangerous grade crossing and furnishes a clear roadway, with a slight change of grade in front of the respondents' property.

We think this appeal is controlled by our decision in the case argued with it affecting Michigan street. (*Matter of Grade Crossing Commissioners*, 154 N. Y. 550.) The main difference between the two cases lies in the extent of the

injury, and clearly the Special Term had no power to refuse to appoint commissioners, even if it was of the opinion that the injury was slight, and the damages caused thereby apparently of little consequence. It was its duty to appoint the commissioners and thus create the tribunal authorized by law to find the extent of the injury and to award damages in accordance therewith, so that the landowner could have his day in court before his claim was extinguished by the operation of the statute. The commissioners are required by the Grade Crossing Act to hear the proofs and allegations of the parties, and to report the amount of compensation to be paid to the owners for any injury to their lands caused by making the improvement. The statute speaks of "lands injured," of lands that "may be injured" and of lands "claimed to be injured," in connection with the duty of ascertaining the compensation. When it provides for the appointment of commissioners, it mentions lands "which may be injured;" when it directs the commissioners to "view" the premises, it says, lands "claimed to be injured," but when the power of awarding damages is conferred upon the commissioners, it is limited to "the injury thereto;" that is, the injury actually done to the lands. In exercising the power of eminent domain it sometimes happens that lands not taken are injured seriously, others but slightly, and others, although near by, not at all. When a statute authorizes compensation to be made for lands not taken, but which may be injured, through a commission appointed by a court of record, and directs the commissioners to hear the parties, pass upon their claims and report the amount of compensation, and that "all claims for damages to the property claimed to be injured shall" thus "be extinguished," the power to award compensation carries with it the power to measure the injury by the rules of evidence, and to determine whether, and to what extent, the property has been injured. If no injury is shown, no compensation can be awarded, but if any injury is shown, damages must be awarded in proportion to its extent, whatever it may be. The application of the grade crossing commissioners, based on their conclusion that

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certain property "may be injured," simply sets in motion the legal machinery provided by the statute, and the commissioners appointed upon such application pass upon the fact of injury and assess the damages accordingly. There was no necessity of sending the question whether the lands were injured to one tribunal for determination, and the question as to the amount of the injury, if any, measured in money, to another, as both questions are necessarily involved in passing upon the claim for damages.

The order should be affirmed, with costs.

All concur.

Order affirmed.

DAVID K. MCCARTHY et al., Appellants, v. FREDERICK P. OCKERMAN, Respondent.

1. REPLEVIN — CLAIM OF THIRD PARTY TO PROPERTY IN POSSESSION OF SHERIFF. A third party making claim to property in the possession of the sheriff under a valid requisition in an action of replevin must assert his claim by filing the affidavit required by sections 1709 and 1710 of the Code of Civil Procedure; and no action can be maintained against the sheriff for the taking or detention by him of specific property under such circumstances except in the manner prescribed by these sections.

2. VALID REQUISITION — SUFFICIENT DESCRIPTION. The description of the property in the affidavit accompanying the requisition in an action of replevin is sufficient to render the requisition valid in that respect, so as to protect the sheriff from suit by a third party to recover the property, if it describes the property sufficiently to enable the sheriff to take it from the defendant and deliver it to the plaintiff.

McCarthy v. Ockerman, 92 Hun, 19, affirmed.

(Argued December 16, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered February 1, 1896, upon an order which reversed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Circuit and granted a new trial.

This is an action of replevin. The facts, so far as material, are stated in the opinion.

Raymond Cobb for appellants. For the purposes of this appeal the questions of fact, as found by the trial court, must be deemed established in favor of the plaintiffs, and this appeal brings up for review the single question of law, whether the requisition in replevin issued to the defendant protected him in taking and detaining the goods in suit which belonged to these plaintiffs. (Code Civ. Pro. §§ 1337, 1338; *Foster v. Persch*, 68 N. Y. 400; *Danziger v. Hoyt*, 120 N. Y. 190; *Whitman v. Foley*, 125 N. Y. 651; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 219; *Otten v. M. R. Co.*, 150 N. Y. 400; *Schram v. Werner*, 81 Hun, 561; *Fogarty v. Hook*, 84 Hun, 165; *Arthur v. Wright*, 57 Hun, 22; *Daly v. Wise*, 132 N. Y. 306; *Dillon v. Cockcroft*, 90 N. Y. 649; *Kirtz v. Peck*, 113 N. Y. 222; *Provost v. McEncroe*, 102 N. Y. 650.) The process in replevin, under which the defendant attempted to justify the taking and detention of plaintiffs' goods, was not valid and regular on its face, and, hence, afforded him no defense to the action. (Code Civ. Pro. §§ 1709, 1710; *Fiero on Spec. Actions*, 740; *C. E. Bank v. Blye*, 101 N. Y. 303; *Cobbey on Replevin*, §§ 617, 643, 644; *Wells on Replevin*, §§ 243, 244, 264, 669; *Kerr v. Mount*, 28 N. Y. 665; *Norris v. Jones*, 7 Misc. Rep. 201; *Parker v. Walrod*, 16 Wend. 514; *People v. Warren*, 5 Hill, 440; *Clearwater v. Brill*, 63 N. Y. 627; *S. Nat. Bank v. Dunn*, 63 How. Pr. 439; Code Civ. Pro. §§ 1695, 1717; *Wiley v. Rooney*, 16 N. Y. Supp. 471; *De Requie v. Lewis*, 3 Robt. 708; *Talcott v. Belding*, 46 How. Pr. 420.) The alleged requisition in replevin issued to the defendant in the action of *Beach v. Seymour*, did not describe the chattels involved in this suit, nor authorize the defendant to take them into his possession; as to these chattels the defendant is a trespasser and cannot rely on his writ, though valid, for protection. (*Cobbey on Replevin*, §§ 642, 645; *Wells on Replevin*, § 273; *Klinkowstein v. Greenberg*, 15 Misc. Rep. 479; *Lehman v. Mayer*, 8 App. Div. 311; *Bullis v. Montgomery*, 50 N. Y. 353; *Otis v. Williams*, 70 N. Y. 211; *De Witt v. Morris*, 13 Wend. 496; *Stimpson v. Reynolds*, 14 Barb. 506; *Clark*

v. *Skinner*, 20 Johns. 465; *Deutsch v. Reilly*, 8 Daly, 132; *Foster v. Pettibone*, 20 Barb. 350; *King v. Orser*, 4 Duer, 431.)

Robert S. Parsons for respondent. The replevin process in the action of William Beach against Charles O. Parsons George R. Seymour and Charles P. Seymour was a valid process, the defendant in this case was legally in possession thereunder, and, for these reasons, independent of the merits, this plaintiff cannot maintain this action. (Code Civ. Pro. §§ 1695, 1697; *Smith v. Stanford*, 62 Ind. 392; *Cobbey on Replevin*, §§ 547, 549, 550, 552, 618, 619; *Waldron, Wrightman & Co. v. Leach*, 9 R. I. 588; *Malone v. Stickney*, 88 Ind. 594; *Fiero on Spec. Actions* [2d ed.], 779, 780; *Litchman v. Potter*, 116 Mass. 371, 373; *Smith & Co. v. McLean*, 24 Iowa, 323; *City of Fort Dodge v. Moore*, 37 Iowa, 388; *Lawrence v. Evarts*, 7 Ohio St. 194; *Furwell v. Fox*, 18 Mich. 166; *De Witt v. Morris*, 13 Wend. 496; *Root v. Woodruff*, 6 Hill, 418.) The fact that the plaintiffs in this case entirely failed to comply with sections 1709 and 1710 of the Code of Civil Procedure is undisputed, and this failure is fatal to their recovery. (*McCarthy v. Ockerman*, 92 Hun, 19; *Fiero on Spec. Actions* [2d ed.], 796; *Hastings v. Nagel*, 83 Hun, 205; *P. H. E. Co. v. Baggaley*, 12 N. Y. Supp. 218; *Edgerton v. Ross*, 6 Abb. Pr. 189; 3 Rumsey's Pr. 171; *F. Nat. Bank of Oswego v. Dunn*, 97 N. Y. 149; *M. B. & Co. v. Keenan*, 73 N. Y. 45; *U. S. v. W. A. Council*, 54 Fed. Rep. 994; 1 Starkie on Ev. [5th ed.] 282; *Fife v. Bohlen*, 22 Fed. Rep. 878; *Bates v. Fuller*, 8 Lea [Tenn.], 644; *Lloyd v. Anglin*, 7 Yerg. [Tenn.] 428; 2 Whart. on Ev. § 833.) The property which is the subject of this action, as well as the entire stock of goods contained in the store mentioned in the bill of sale, was, at the time of the commencement of this action, in the custody of the law; and McCarthy & Sons, the plaintiffs herein, had no right to disturb that custody or invade it with inconsistent process. (*F. Nat. Bank of Oswego v. Dunn*, 97 N. Y. 149; *Hagan v. Lucas*, 10 Pet. 400-404;

Covell v. Heyman, 111 U. S. 176; *Acker v. White*, 25 Wend. 614, 615; *Hall v. Tuttle*, 2 Wend. 475; *Cobbey on Replevin*, §§ 705, 706, 709.)

O'BRIEN, J. The defendant is the sheriff of Broome county. The plaintiffs allege that on or about June 7, 1893, he took and wrongfully detains from them certain personal property, consisting of dry goods and other merchandise particularly described in the complaint, annexed affidavit and requisition to the coroner, in an action to recover specific personal property. It appears from the proofs and findings that the property, which is the subject of this action, was purchased from the plaintiffs by the firm of Parsons and Beach, but that the sale was void for fraud practiced upon the plaintiffs by the purchasing firm through false and fraudulent representations. It further appears that, before the commencement of this action, the plaintiffs rescinded the sale. The property was taken from the defendant's possession on the 7th day of June, 1893, by the coroner. The defendant held the property under papers delivered to him for execution in an action precisely similar to this, wherein Beach was plaintiff and Parsons and others defendants. By virtue of those papers the defendant had taken possession of the property on the 6th day of June, 1893, the day before the plaintiffs commenced this action.

Assuming that the papers in the first action were sufficient in form to authorize the defendant, as sheriff, to take possession of all the property described therein, which included the goods now claimed by the plaintiffs, it follows that the goods which the coroner took in this action were at the time in the custody of the law, and the plaintiffs have not pursued the proper remedy. (*Elgerton v. Ross*, 6 Abb. Pr. 189; *Manning v. Keenan*, 73 N. Y. 45; *First National Bank of Oswego v. Dunn*, 97 N. Y. 149; *Hastings v. Nagel*, 83 Hun, 205; *Fiero on Spec. Actions* [2d ed.], p. 796.)

A third party making claim to property in the possession of the sheriff under a valid requisition in an action of replevin

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must assert his claim by filing the affidavit prescribed by sections 1709 and 1710 of the Code of Civil Procedure. No action can be maintained against the sheriff for the taking or detention by him of specific property under such circumstances, except in the manner prescribed by these sections. The plaintiffs' answer to this point is that the papers in the first replevin action, under which the defendant held the property when this suit was commenced, were absolutely void on their face and afforded no protection to the sheriff. It is doubtless true that property cannot be said to be in the custody of the law unless the officer has some legal process, sufficient upon its face, at least, to enable him to hold it. The only defect which the learned counsel for the plaintiffs has been able to point out in the papers under which the defendant originally took possession of the property is in the description. He contends that the description in the papers was not sufficient to enable the officer to identify the goods, and, hence, the process was void.

In this we think he is clearly in error. The process was in the usual form and required the defendant as sheriff "to replevy the chattels described in the within affidavit from the defendant." In the affidavit the plaintiff swears that he is the owner and entitled to the immediate possession of the following articles of personal property: "All the dry goods, notions, carpets, wall paper, crockery, boots and shoes, groceries, fixtures, safe and the personal effects of Parsons & Beach in the Birdsell Block, in the said village of Whitney's Point." Since the purpose of the action was to recover all the goods in a certain store, the description, though in general terms, was sufficient. If the action related to but a part of the goods that had to be identified and separated from the whole mass the description would necessarily have to be more specific. But the description of the goods in the process under which the defendant held them would be sufficient to pass title in a mortgage or bill of sale. If the property is sufficiently described to enable the officer to take it from the defendant and deliver it to the plaintiff in an action of replevin

the process is not void. In this case the description was amply sufficient for that purpose, and this, we think, is a fair test of the question. (*Litchman v. Potter*, 116 Mass. 371; *Waldron, Wightman & Co. v. Leach*, 9 R. I. 588; *Smith v. Stanford*, 62 Ind. 392; *Cobbey on Replevin*, § 552.)

The return of the sheriff was indorsed upon the papers to the effect that on the 6th day of June, 1893, "pursuant to the annexed requisition, I took possession of all the personal property mentioned in the annexed affidavit," etc. We cannot doubt that the defendant brought himself within the statute and rules of law which protect a sheriff from suits for the recovery of property legally in his custody as an officer of the law, and so we think that the judgment of the trial court in favor of the plaintiffs was properly reversed.

The order and judgment of the General Term should be affirmed and judgment absolute ordered for the defendant, with costs.

All concur.

Order and judgment affirmed, etc.

THE COUNTY OF MONROE, Respondent, v. THE CITY OF ROCHESTER et al., Appellants.

1. MUNICIPAL CORPORATIONS — ASSESSMENT FOR LOCAL IMPROVEMENT — COLLATERAL ATTACK. A party cannot dispute, by a collateral attack (as, by an action to set aside the assessment upon his property and enjoin its collection), the correctness of a municipal assessment for a local improvement, where mere irregularities, or errors of a formal nature, have been committed, or where the ground of complaint is in the excess of the amount of the assessment over his due proportion. The remedy in such a case is by certiorari.

2. UNEQUAL ASSESSMENT. Proof of facts showing merely a grossly unequal assessment for a local improvement does not permit the inference that the municipal officers adopted some erroneous principle which resulted in the injustice complained of and which justifies the intervention of the court, when appealed to through an action to vacate the assessment on the plaintiff's property.

3. ERRONEOUS RULE OR PRINCIPLE — TRANSGRESSION OF JURISDICTION. To justify relief through an action to set aside an unequal local

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assessment on the plaintiff's property, it must appear that, in the methods pursued in making the assessment, the inequality was, or may have been, due to some erroneous rule or principle. The facts should show that the municipal officers had transgressed their jurisdiction and that, in making the assessment, they had, in fact, disregarded the ordinance or resolution from which they derived their sole authority to act.

4. CLOUD ON TITLE — EXTRINSIC EVIDENCE. The rule allowing equitable relief by way of removal of cloud on title, when the claim or lien purports to affect real estate and appears on its face to be valid, and the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in proceedings to enforce the lien, applies to an action which collaterally attacks a local assessment, by seeking to set it aside; but the extrinsic evidence, resorted to in such action, must show the defect relied upon to be one affecting the jurisdiction of the municipal officers.

5. FACTS SHOWING TRANSGRESSION OF JURISDICTION BY MUNICIPAL OFFICERS. A case for relief, in an action to set aside a municipal assessment upon the plaintiff's property for a street opening, is made out when, in addition to facts showing that the plaintiff's assessment was excessive and unequal, it appears that whereas the ordinance of the common council described specifically a certain territory as the portion of the city which was deemed benefited and proper to be assessed for the whole expense of the improvement, and required that the assessment should be made by the assessors upon the property described, the facts disclose that the assessors allowed themselves a latitude of authority in excess of that conferred and undertook to make exemptions with respect to the properties within the territory of assessment; that, after grading the territory into districts, they failed to apply a uniform rule in assessing the property so graded; and that they made unauthorized distinctions with respect to the uses of the properties coming under the assessment.

County of Monroe v. City of Rochester, 88 Hun, 164, affirmed.

(Argued November 30, 1897; decided January 11, 1898.)

APPEAL from an order of the General Term of the Supreme Court in the fifth judicial department, entered June 22, 1895, which reversed a judgment in favor of defendants, entered upon a decision of the court dismissing the complaint on trial at an Equity Term and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. J. Rodenbeck for appellants. Respondent was bound to show affirmatively that the assessment was erroneous or illegal. (*Harriman v. Howe*, 78 Hun, 282; *In re Ingraham*,

Points of counsel.

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64 N. Y. 310; *In re Merriam*, 84 N. Y. 596; *In re Brady*, 85 N. Y. 268; *In re Voorhis*, 90 N. Y. 668; *People ex rel. v. Davenport*, 91 N. Y. 581; *Tingue v. Vil. of Port Chester*, 101 N. Y. 294.) All questions concerning the assessment should be construed liberally to sustain the proceedings and with reference to the very right of the case, and not strictly, and all irregularities, omissions and errors not affecting substantial merits should be disregarded. (L. 1880, ch. 14, §§ 214, 215; *People ex rel. v. City of Rochester*, 5 Lans. 142; *Ireland v. City of Rochester*, 51 Barb. 433; *Hassan v. City of Rochester*, 67 N. Y. 528.) A failure to appear before the assessors on grievance day operated as a waiver of all but jurisdictional defects. (*In re Winegard*, 78 Hun, 58.) The assessors adopted the correct rule in assessing the property for the opening of the new street, and applied it uniformly to all the property assessed, and there being no irregularities which were not cured by the provisions of the city charter referred to, and the failure to present allegations, the assessment should stand. (*Elwood v. City of Rochester*, 43 Hun, 102; 122 N. Y. 229; *Collins v. City of Holyoke*, 146 Mass. 298; *Hoffeld v. City of Buffalo*, 130 N. Y. 393; *O'Reilley v. City of Kingston*, 114 N. Y. 448; *Clark v. Vil. of Dunkirk*, 12 Hun, 181; 75 N. Y. 612.) The other objections raised by the respondent to the assessment are untenable. (L. 1880, ch. 14, §§ 171, 181, 190, 199, 202, 206, 214; *Elwood v. City of Rochester*, 43 Hun, 108; *Wright v. City of Boston*, 9 Cush. 239; L. 1892, ch. 190, § 180; Suth. on Stat. Const. § 260; *Butts v. City of Rochester*, 1 Hun, 600; *Ireland v. City of Rochester*, 51 Barb. 434; *People ex rel. v. City of Rochester*, 5 Lans. 142; *In re Cruger*, 84 N. Y. 619; *In re Ingraham*, 64 N. Y. 310; *Hassen v. City of Rochester*, 65 N. Y. 516; *In re Ryers*, 72 N. Y. 1; *People ex rel. v. Mayor, etc.*, 63 N. Y. 295; *O'Reilley v. City of Kingston*, 114 N. Y. 450.) If the assessors did not proceed upon some erroneous principle in spreading the assessments, the grounds upon which respondent complains are reviewable only by a direct proceeding by certiorari, and the complaint was prop-

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erly dismissed at the Special Term. (Cooley on Taxn. [1st ed.] 533; *Guest v. City of Brooklyn*, 69 N. Y. 506; *Kennedy v. City of Troy*, 77 N. Y. 493; *In re Cruger*, 84 N. Y. 621; *Hoffeld v. City of Buffalo*, 130 N. Y. 392; *Lyon v. City of Brooklyn*, 28 Barb. 609; *In re Sackett, etc., Streets*, 74 N. Y. 107; *In re Mead*, 74 N. Y. 216.)

John Desmond for respondent. The order appealed from reversed the judgment for errors of fact. Therefore, if there be any evidence to support plaintiff's claim, this court has no jurisdiction to review the facts or the evidence, except to determine if there be any evidence to support plaintiff's claim. (Code Civ. Pro. §§ 191, 1337, 1338.) The assessors acted dishonestly in assessing plaintiff's property. (*Ellwood v. City of Rochester*, 122 N. Y. 229; *Thomas v. Gain*, 35 Mich. 154; Cooley on Taxn. [2d ed.] 218, 219, 242; *In re Baird v. Bd. of Suprs.*, 138 N. Y. 95; *People ex rel. v. Rice*, 135 N. Y. 500; Code Civ. Pro. § 1022; *Becker v. Koch*, 104 N. Y. 404.) Plaintiff sought to show by what rule, if any, the state Erie canal lands were assessed. The evidence was excluded and plaintiff excepted. This was error. One of the assessors had already testified that he assessed the frontages of lots according to grades. He certainly could not have done so as to the property of the state, and if he did not, then he adopted two rules and the assessment is void. (*Ellwood v. City of Rochester*, 122 N. Y. 229; *Thomas v. Gain*, 35 Mich. 154; L. 1880, ch. 14, § 82; *Ten Eyck v. Witbeck*, 135 N. Y. 40; *Hassan v. City of Rochester*, 67 N. Y. 528; Cooley on Taxn. [2d ed.] 207, 652; *Louisville v. Navin*, 10 Bush. 549; *Lima v. C. Assn.*, 42 Ohio St. 128; *Moore v. City of Albany*, 98 N. Y. 409.) The assessment was, in fact, made upon the frontages of the lots, and without reference to the buildings thereon. The resolution ordering the assessment directed the same to be made on the "lots and parcels of land," as provided in section 214 of the charter instead of directing it to be made on the "houses and lands," as provided by section 215 of the charter. This omission was held immaterial by the learned

trial justice. That "houses and lands" and "lots and parcels of land" were synonymous terms. While, in a general sense, this may be true, it is submitted that, for the purpose of this assessment, it is incorrect. (*Clark v. Vil. of Dunkirk*, 12 Hun, 182; 75 N. Y. 612; *Kennedy v. City of Troy*, 77 N. Y. 494; *Sanders v. Downs*, 141 N. Y. 422.) The assessment is illegal and void for the reason that the assessors who made the assessment were interested in the property assessed. (L. 1880, ch. 14, §§ 180-196; *Fallon v. Lawler*, 102 N. Y. 228; *Frear v. Sweet*, 118 N. Y. 454.) No oath was attached to the roll. (*Stebbins v. Kay*, 123 N. Y. 31; *Merritt v. Vil. of Portchester*, 71 N. Y. 309; *M. L. Ins. Co. v. Mayor, etc.*, 61 N. Y. S. R. 250.) The assessment is void for the reason that the value of plaintiff's property does not appear on the roll, nor the value of any city property, nor the value of any church property. (*Sanders v. Downs*, 141 N. Y. 426; *Merritt v. Vil. of Portchester*, 71 N. Y. 309; *Stebbins v. Kay*, 123 N. Y. 31; *Newell v. Wheeler*, 48 N. Y. 486.) Plaintiff is entitled to judgment because the certificate of sale provided by sections 104 and 108 of the charter is presumptive evidence of the regularity of the assessment, and this is so whether or not the defects complained of appear upon the face of the roll. (*Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 38 N. Y. 276; *Allen v. City of Buffalo*, 39 N. Y. 386; *Hassen v. City of Rochester*, 65 N. Y. 516.) Section 198 of the charter provides that where the expense of an improvement shall exceed \$10,000 the common council may determine that the taxpayers may pay their assessment in not more than five equal payments. The common council in this case did determine that the taxpayers might pay their assessment in five equal payments. This determination was disregarded in ordering this assessment by the common council and making it by the city assessors. (*Hassan v. City of Rochester*, 67 N. Y. 528.) Although one of the assessors was called as a witness by plaintiff, yet the court is not bound to accept what he may testify to as true nor is the plaintiff estopped by what he says. (*Becker v. Koch*, 104 N. Y. 402.) The application of a dif-

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ferent rule than had been applied to any other property renders the assessment void. (*Ellwood v. City of Rochester*, 122 N. Y. 229; *Haviland v. City of Columbus*, 50 Ohio St. 471.) It is urged by the counsel for the defendants that plaintiff cannot maintain this action for the reason that section 215 of the city charter provides that any assessment authorized by the charter is declared valid and effectual notwithstanding irregularities, omissions or errors in any of the proceedings relating to the same, and that this provision covers all the errors and defects complained of. This is untenable. (*Hassen v. City of Rochester*, 65 N. Y. 520; *Stebbins v. Kay*, 123 N. Y. 31; *Sanders v. Downs*, 141 N. Y. 422; *Merritt v. Vil. of Portchester*, 71 N. Y. 309.) The objection made by the defendants against the right to maintain this action, that none of the defects are jurisdictional and that because the common council and assessors published the notices required by the charter before confirming this roll, the plaintiff is now estopped from making any claim by reason of said defects, is untenable. (*Sanders v. Downs*, 141 N. Y. 422; *Cooley on Taxn.* 302; *Hassan v. City of Rochester*, 67 N. Y. 537; *People ex rel. v. Wilson*, 119 N. Y. 515; *Stebbins v. Kay*, 123 N. Y. 31; *Merritt v. Vil. of Portchester*, 71 N. Y. 309; *Newell v. Wheeler*, 48 N. Y. 486; *In re City of Rochester*, 31 N. Y. S. R. 75, 78.) The claim of the defendant's counsel that plaintiff's only remedy in this case is certiorari is clearly untenable. The granting of a writ of certiorari is a discretionary act. (Code Civ. Pro. §§ 1638, 2127; *People ex rel. v. Lohnas*, 54 Hun, 609; *In re Flushing Ave.*, 101 N. Y. 678; *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 38 N. Y. 276; *Allen v. City of Buffalo*, 39 N. Y. 386; *Hassen v. City of Rochester*, 65 N. Y. 516; *Hassan v. City of Rochester*, 67 N. Y. 528.)

GRAY, J. This action was brought to set aside an assessment imposed upon the plaintiff's property for the expense of opening a new street, in the city of Rochester, and to obtain an injunction restraining the collection of the assessment.

It appears that, in 1881, the common council of the city adopted an ordinance for the opening of what is known as Church street. The ordinance designated, as the portions of the city deemed to be benefited and proper to be assessed for the whole expense of the opening of the street, "the entire First ward; also all that portion of the Second ward bounded," etc. After the assessment was completed, Ellwood, one of the persons assessed, commenced an action against the city to set it aside. The result of the action was favorable to him and the judgment, which vacated the assessment upon his property, was affirmed by this court. (122 N. Y. 229.) The ground, upon which the affirmance here was placed, was that there had been a failure on the part of the commissioners of assessment to comply with the ordinance and with the requirements of the charter. The commissioners had divided the territory of assessment into two districts; one of which, they decided, would receive a special benefit from such improvement, while the other would receive only a general benefit. They assessed the district deemed specially benefited by apportioning upon each lot therein a sum according to its feet of frontage, without regard to the value of buildings and improvements, and they assessed the district deemed generally benefited by a general assessment according to percentages on the lots therein. It was held that, in so doing, the commissioners had disregarded the determination of the common council, that all of the lands would be specially benefited and that they had, in effect, by their unauthorized action, contracted the area of special benefits. It was observed in the opinion that, "presumptively, therefore, his," (plaintiff's), "assessment was increased by the determination not to assess for special benefits in the other sub-district." As the final judgment in the Ellwood action did not enjoin the city from making another assessment for the improvement, in 1893, the common council adopted a resolution, under the provisions of section 215 of the city charter, that a reassessment for the improvement should be made. This resolution required the assessors, "to make the

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reassessment of the property described in said ordinance," (meaning thereby the first ordinance), "for the opening of said street, as nearly as may be to the advantage which said lots and parcels of land within the territory directed to be reassessed shall be deemed to receive by the making of said improvement," etc. The new assessment roll having been prepared and confirmed by the common council, thereafter, the present action was commenced and, in its complaint, the plaintiff alleges various grounds as entitling it to a judgment declaring the assessment void and enjoining the proceedings to collect it. At the Special Term of the Supreme Court, judgment went for the defendants and the complaint was dismissed; the learned trial judge holding, in his decision, that "the alleged defects in the assessment roll are such irregularities or omissions as do not invalidate it" and, that, although the assessment against the plaintiff's property is largely excessive, yet that the assessors had proceeded upon a proper rule and any error in that respect was one of discretion which could not be corrected in this action. Upon appeal to the General Term, the judgment of the Special Term was reversed; the order of reversal being for errors of fact as well as for errors of law.

We are satisfied with the disposition which was made by the trial court of all the various objections made by the plaintiff to the assessment proceedings, except as to the one which related to the rule, or principle, adopted by the assessors in making their assessment. The reasons, stated in the opinion delivered by the learned trial judge, for overruling the various objections, except the one referred to, are perfectly satisfactory to us; as they were to the General Term. By reference to the opinion delivered there, it will appear that it was thought that the relatively unjust and unequal assessment of the plaintiff's property must have resulted, not from an error of judgment, but because improper considerations had influenced the minds of the assessors and had caused them to adopt some erroneous rule. In the discussion upon that point, the conclusions of the General Term rest upon what they

observed to be the flagrant inequality in the assessment, when properties, similarly situated with and in the immediate neighborhood of the plaintiffs, were compared as to amounts of assessments. The instances are referred to in the evidence where certain of these properties, which adjoined the plaintiffs on either side and had a greater frontage and depth and a concededly greater value, were assessed to the extent of about half, and less than half, of the amount, at which the plaintiff was assessed. While we think the reversal of the Special Term judgment was proper, we are not able to concur in the reasoning of the opinion at the General Term and, therefore, deem it necessary to state the grounds upon which we place our affirmance of the order of reversal.

That this assessment was highly unjust, the evidence shows; but the reasoning of that opinion is hardly sufficient to take the case out of the rule of law, which forbids a party to dispute, by a collateral attack, the correctness of an assessment, where mere irregularities, or errors of a formal nature, have been committed, or where the ground of complaint is in the excess of the amount of the assessment over his due proportion. The remedy, in such a case, is by certiorari to review the proceedings objected to. Apparently, the learned General Term justices were of the opinion that where the evidence shows such an inequality in the assessment as to make it appear, relatively, grossly unjust, inferences are permissible that the municipal officers had adopted some erroneous principle, which resulted in the great injustice to the complainant and which justified the intervention of the court, when appealed to, through an action to vacate the assessment. Such inferences, however, must arise in other facts than those showing a merely grossly unequal assessment. It must appear that, in the methods pursued in making the assessment, the inequality was, or may have been, due to some erroneous rule or principle. The facts should show that the municipal officers had transgressed their jurisdiction and that, in making the assessment, they had failed to comply with and had, in fact, disregarded the ordinance or resolution from which

they derived their sole authority to act. We think those facts do appear clearly enough, in this record, to enable us to find support for the order of reversal below and we shall, as briefly as possible, hereafter, point them out.

Preliminarily it may be remarked, with reference to such an action as this, which collaterally attacks the assessment, that it comes under that head of equity which awards relief when the object is to remove a cloud from the title. Judge FOLGER, in *Marsh v. City of Brooklyn* (59 N. Y. 281), stated the conditions, which entitled the party to invoke the aid of a court of equity, to be, "when the claim or lien purports to affect real estate and appears on its face to be valid; when the defect in it can be made to appear, only, by extrinsic evidence, which will not necessarily appear in proceedings by the claimant thereof to enforce the lien." This rule, often stated in this court since the case of *Scott v. Onderdonk*, (14 N. Y. 1), and carefully reviewed in *Guest v. City of Brooklyn*, (69 N. Y. 506), is well established. The rule is applicable to such a case as this; but the extrinsic evidence, resorted to in aid of the action, must show the defect relied upon to be one affecting the jurisdiction of the municipal officers and, hence, invalidating the claim to hold the plaintiff's property for the amount of the assessment imposed upon it. In *Hoffeld v. City of Buffalo*, (130 N. Y. 387), an action of similar character, BRADLEY, J., observed that, "While the excess may be so greatly out of proportion as to permit the inference of corrupt purpose or of adoption of an erroneous rule of estimate, the matter of excess is one of degree only; and if in one case an assessment, having the support of jurisdiction of the assessors and of presumption of regularity, may, upon the evidence of witnesses to the effect that it was disproportionately made upon the lands, be vacated in a collateral action, the question would be an open one in every case where some one or more of the persons whose lands are subjected to assessment deem themselves aggrieved for such cause." What is essential to the maintenance of the action is that the assessment was illegal and that the illegality can only be made to appear by extrinsic

evidence. If the municipal officers have acted within their jurisdiction in making the assessment complained of, that the evidence makes it appear to be disproportionate does not prove, necessarily, that an erroneous rule was adopted.

Referring to the evidence in this record, we find that, whereas the ordinance of the common council described, as the portion of the city which was deemed benefited and proper to be assessed for the whole expense of the improvement, the entire first ward and all of a certain described portion of the second ward and required that the reassessment to pay for the improvement should be made by the assessors upon the property described, the facts disclose that the assessors allowed themselves a latitude of authority in excess of that conferred and undertook to make exemptions with respect to the properties within the territory of assessment.

One of the assessors, being examined as a witness, testified as to the instances, in which they had made such exceptions and had applied a different rule from what they had applied to the rest of the district. It seems that they divided the territory of assessment into seven grades; the property placed in each grade varying from \$40.00 per foot of frontage, down to \$1.25. They estimated that they had about 30,000 feet of frontage to assess, for the purpose of raising the \$185,000 required by the ordinance, and, admitting that they could adopt this method of assessment of subdividing the territory into districts, graded for assessment at certain figures per foot of frontage for each district, it is clear that the rule should be consistently applied and that there should not be two rules of apportionment of the same assessment in the same district; for that would result in mere arbitrary official action. If, after having subdivided the territory of assessment into districts which, being assessed at a certain rate per foot of frontage, would produce the whole amount required to be raised, the assessors diminished the amount of the frontage on some of the property, in one or more of the sub-districts, upon which the assessment must be levied according to their method, or if properties devoted to particular usage, as, for instance

in this case, church properties, receive partial exemption, this injustice would result, that the amount of the assessment must be increased upon some other property in the general territory, beyond what would be its due and just proportion. An assessment made under such conditions cannot be said to be governed by a rule uniform as to all the property within the benefited district and must be condemned as illegal. Nor was it within the letter, or the spirit, of the ordinance, under which the assessors derived their authority to act. The witness, Munn, in his testimony, told of the instances where they had exempted properties from the assessment, which would have been imposed, had the rule based upon the feet of frontage been observed in their case. His explanation was that, having estimated that a piece of property was benefited to a certain extent, if the figures of the frontage, according to the grade in which the property found itself, would make up a larger sum than that which was represented by their estimate, they would reduce the number of feet for the purposes of the assessment. He, also, testified that, in some cases, the frontage of a piece of property would be increased for assessment purposes; so that the amount of the assessment might be brought up to equal the figure at which they estimated the benefit received by the property. Several of the cases, where there had been exemptions of frontages in the levying of the assessment, were of properties benefited by new frontages upon Church street itself, and there were cases where the fact of the property being used for a church was regarded as entitling it to an exemption.

The facts in the record show that, even according to the method adopted by these assessors, there was no uniform rule of practice, which would have imposed upon each piece of property its due and proportionate share of the assessment. It may be true that all the property in the territory was, in a sense, assessed; but the legal error, which affected and vitiated the assessment, was the failure to apply a uniform rule in assessing the property, thus graded into districts. It is not only presumable, but very certain, if all the property within

the territory of assessment had been, in fact, assessed per foot of frontage, according to the plan adopted, that the assessment upon the plaintiff's property would not have been so grossly excessive, relatively to other properties similarly situated. Furthermore, we find no authority for the assessors to make any distinction with respect to the uses of the properties coming under assessment. The commercial benefits must accrue equally to all properties similarly situated.

Not only have these considerations led us to the conclusion that the assessment was illegally made; but inferences from the facts are irresistible that no just apportionment of the burden of this tax was made by the assessors; such as would have resulted from the application of some one uniform rule which, bearing alike upon all, and having reference to the buildings upon the land and the benefits received by the municipal improvement, produces equality. The plaintiff's court house block would not have been assessed at \$16,000, while the adjoining larger blocks, with their great commercial buildings, were assessed at about half that amount, if such a rule had guided the exercise of the assessors' discretion.

The plaintiff was justified in coming into a court of equity; there to show the illegal nature of the assessment by extrinsic evidence, and we think that the order appealed from should be affirmed.

Judgment absolute should be rendered in favor of the plaintiff, upon the stipulation of the defendants, with costs.

All concur.

Order affirmed and judgment accordingly.

HENRY R. DURFEE et al., as Executors of CHARLES G. POMEROY, Deceased, Respondents, v. FRANCES POMEROY, Appellant, Impleaded with Others.

1. WILL — GIFT OF RENTS AND INCOME. A testamentary gift of the rents and profits of land, or gift of the income arising from personal property, vests such an estate in the devisee or legatee as conforms to the evident intention of the testator.

2. SUSPENSION OF POWER OF ALIENATION. The fact that the executors, as such, may have to deal with the income of the vested interests in order to carry out the provisions of the will does not create any illegal suspension of the power of alienation.

3. WILL CONSTRUED. The will of a testator who left surviving a married daughter and an unmarried son, created two distinct trusts, each consisting of one-half of the residuary estate, real and personal, the rents and income of one to be paid to the daughter for life, and the rents and income of the other to be paid to the son until he attained the age of forty-five, or until such later period at which the executors might deem him fit to receive the principal. The will disclosed an intention that the property should follow the testator's blood in the ultimate disposition thereof, and in connection with provisions to that intent, declared that if the son, "in the event of his death within the periods aforesaid, should leave no child or children him surviving, but should leave a wife him surviving, then she is to have and I devise and bequeath to her one-half of the income of said half of the rest, residue and remainder of my said property, so long as she shall remain his widow unmarried, the other one-half of said income to be held by my said executors or their successors and paid by them to and for the use of my daughter. In case the wife of my said son should marry again, then the share of said income so bequeathed to her is to go to my daughter if she then survives; if not, to her children." The son died before attaining the age of forty-five, childless, but leaving a widow. *Held*, that the provision for the son's widow was not void as being under a trust which was thereby made to involve an illegal suspension of the power of alienation; but, *held*, that the legal effect of the son's death was to terminate the trust for his benefit, and that the devise and bequest of one-half of the income of the principal theretofore tied up in the trust, to his widow, vested in her a legal estate in one-half of the principal, real and personal, to wit, a life estate during her widowhood.

Durfee v. Pomeroy, 7 App. Div. 431, reversed.

(Argued December 3, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 22, 1896, affirming a judgment of Special Term construing the will of the late Dr. Charles G. Pomeroy, of Newark, N. Y.

The material portions of the will are as follows:

"*First.* I will and devise the house and lot on which I reside, being my homestead, in the village of Newark aforesaid, including any new house or buildings that I may, after the date of this my will, put upon said premises, to my son, Rhea B. Pomeroy, for and during his natural life; and after his death, if he leaves a wife and she has a child or children by him then surviving, then to his wife during her life, and after her death, to his child or children absolutely in fee; if he leaves no wife, but leaves child or children, then at and after his death to such his child or children absolutely in fee; if he leaves no child or children, then at and after his death, to my daughter, Eliza A. McIntyre, for and during her natural life, and at and after her death, to her children absolutely in fee."

Subdivision second disposes of certain personal property not material to this suit.

"*Third.* All the rest, residue and remainder of my real and personal property and estate, of every name, kind and nature, wheresoever situate (after deducting said homestead and the articles and property hereinbefore devised and bequeathed), I will, devise and bequeath to my executors hereinafter named, and their successors in trust, upon and unto the uses, purposes and trusts hereinafter named, that is to say:

"The equal one-half of said rest, residue and remainder of my said property and estate, I will, devise and bequeath to my said executors, and their successors, in trust to receive the rents, issues, income and profits (including one-half of the interest on moneys invested) thereof, and pay and apply the same to and for the use of my son, Rhea B. Pomeroy, until he shall arrive at the age of forty-five years, if he shall so long survive, or in case my said son Rhea should not live to reach the age of

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forty-five years, then to apply the same to the use of my said son during his life.

“When my said son shall arrive at the age of forty-five years, if, in the judgment of my executors, or their successors, he is a sober man and fit to be entrusted with said property, then my said executors or their successors are to transfer and convey said one-half of said rest, residue and remainder of my said property and estate to my said son absolutely, to be his absolutely.

“If, when my said son arrives at the age of forty-five years, he is not, in the judgment of my executors or their successors, a sober man, and is not fit to be entrusted with said property, then my said executors or their successors are to retain the same in their hands and control until such time as my said son shall, in their judgment, be a sober man, and fit to be entrusted with said property, and then they are to transfer and convey the same to him, to be his absolutely.

“During the interval before my said son shall arrive at the age of forty-five years, or longer if they should retain possession and control, my executors or their successors are not to sell any of my real estate without my son Rhea's consent, nor shall they during such time repair or rebuild any of my real estate without his advice and consent, and they are to invest any principal or any income thereof in their hands not necessary for immediate use for the purposes of this will, in bond and mortgage on real estate, or in government or New York State securities.

“If my said son previous to the time of his arrival at the age of forty-five years, or previous to the further time above-mentioned when my said executors or their successors shall transfer and convey to him said half of said rest, residue and remainder of my said property as above provided, shall die, leaving a child or children him surviving, then my said executors, or their successors, shall transfer and convey said above-mentioned half of said rest, residue and remainder of my said property and estate to such his child or children absolutely; if he, in such event of his death, within the periods last afore-

said, should leave no child or children him surviving, but should leave a wife him surviving, then she is to have and I devise and bequeath to her one-half of the income of said half of the rest, residue and remainder of my said property, so long as she shall remain his widow unmarried, the other one-half of said income is to be held by my said executors or their successors and paid by them to and for the use of daughter Eliza A. McIntyre; in case the wife of my said son should marry again, then the share of said income so bequeathed to her is to go to my daughter, Eliza A. McIntyre, if she then survives; if not, to her children.

"If my said son Rhea should die before my said executors or their successors, shall, under the foregoing provisions transfer and convey to him the said one-half of the rest, residue and remainder of my said property and estate, leaving no child or children or wife him surviving, then my said executors or their successors are to hold said one-half of said rest, residue and remainder, and I bequeath and devise the same to them in trust to pay the rents, issues, profits and income, of the same to and for the use of my said daughter, her husband and children, under and upon the same trusts, and for the same periods, as are herein below provided in regard to the other one-half of said rest, residue and remainder of my property and estate herein below devised and bequeathed.

"*Fourth.* The other one-half of all the rest, residue and remainder of all my said property and estate remaining after deducting the homestead and the articles and property bequeathed in the above paragraphs of this will, marked "First" and "Second," I will, devise and bequeath to my executors, hereinafter named, and their successors, in trust to receive the rents, profits and income thereof (including half the interest on moneys invested), and apply them to the use of my daughter, Eliza A. McIntyre, for and during her natural life, and from and after her death, to the use of her husband, Samuel B. McIntyre, and of her children equally, share and share alike, for and during the life of said Samuel B. McIntyre, that is, her said husband is to have one share and

each of her children is to have one share of said income, but if said Samuel B. McIntyre should marry again after the decease of my said daughter, then his share of said income is to cease, anything herein to the contrary notwithstanding.

"If my said daughter should die leaving no child or children, but leaving a husband, said executors or their successors shall apply the rents, profits and income of said half of said remainder of my estate to his use so long as he remains single and unmarried, and no longer.

"And if my said daughter should die leaving no husband, but leaving child or children, then my said executors, or their successors, are to transfer and convey the said last-mentioned one-half of said rest, residue and remainder of my said property and estate to such her child or children absolutely and equally, and in that case I will and devise the same to them.

"If my said daughter should die leaving a husband and a child or children, then at and after the death or remarriage of her said husband, said executors or their successors are to transfer and convey said half of said rest, residue and remainder of my said property and estate to her said child or children, and I will and devise the same to them in that event.

"If my said daughter should die leaving no husband or children, then and in that case said half of said residue and remainder of said estate shall go to my executors aforesaid, and their successors, the rents and profits and income thereof to be paid and applied by them to the use of my said son Rhea for the same time as is above provided for the other half of said residue and remainder, and upon the same trusts, for the same length of time, and upon the same conditions as is above provided for the other half of said residue and remainder of my said property and estate."

(Subdivision fifth is not material.)

"*Sixth.* I will and direct that a home shall be provided for my wife's sister, Eurette Miles, for and during her life, at my homestead, and she shall have her whole support from my estate in sickness and health, and burial, the expenses whereof

shall be paid by my executors out of the net income of the whole of my estate, the burial of said Euretta Miles to be on my lot in the Newark cemetery unless she should dictate otherwise.

"In case of my son Rhea's death, so he is not at the homestead to keep house, and she should wish to live somewhere else, she is to have the like support elsewhere where she may select.

"*Seventh.* In case I do not put up a family monument on my burial lot in the Newark cemetery during my lifetime, then my executors are to put up one at a cost not to exceed \$600.00 nor less than \$500.00 within three years after my death, to be paid for out of the income of my whole estate, the character and style of which shall be determined by my son Rhea."

Stephen K. Williams for appellant. The clause in question for the benefit of Frances Pomeroy, the son's wife, is not included in the trust. (*Henderson v. Henderson*, 113 N. Y. 11; *Greene v. Greene*, 125 N. Y. 506; *Mann v. Witbeck*, 17 Barb. 392; *Tucker v. Tucker*, 5 N. Y. 408; *Hillyer v. Vandewater*, 31 N. Y. S. R. 671; *Heermans v. Robertson*, 64 N. Y. 332; *Horndorf v. Horndorf*, 13 Misc. Rep. 347; *Scholle v. Scholle*, 113 N. Y. 261; 2 Jarman on Wills, 842; *Mullarky v. Sullivan*, 136 N. Y. 227; *Lamb v. Lamb*, 131 N. Y. 227.) The plaintiffs have determined their rights by their own action, and also are estopped from setting up the invalidity of this provision. (*Starr v. Starr*, 132 N. Y. 159; *Reid v. Sprague*, 72 N. Y. 457; *Chipman v. Montgomery*, 4 Hun, 742; *T. L. O. Co. v. Marbury*, 91 U. S. 557, 594; *Evers v. Watson*, 156 U. S. 527; *Simmons v. B., etc., R. Co.*, 159 U. S. 278; *Sullivan v. P., etc., R. Co.*, 94 U. S. 806; *Marbury v. Stone*, 17 App. Div. 352; *Kent v. Q. M. Co.*, 78 N. Y. 159; *N. B. Nat. Bank v. C. Co.*, 91 Hun, 447; *Skinner v. Smith*, 134 N. Y. 240.) If the provision for the son is within the trust it is valid, notwithstanding *Schettler v. Smith* (41 N. Y. 328). (Ferne Cont. Rem. 523; 20 Am. & Eng. Ency. of Law, 951; 1 R. S. 723, § 14; *Reid v. Bd. Suprs.*, 128 N. Y. 370; *Shipman*

v. *Rollins*, 98 N. Y. 330; *Tiers v. Tiers*, 32 Hun, 185; 98 N. Y. 569; *Cochrane v. Schell*, 64 Hun, 577; 140 N. Y. 526; *Kiah v. Grenier*, 56 N. Y. 224; *Monarque v. Monarque*, 80 N. Y. 326; *Wilson v. White*, 109 N. Y. 59; *Horton v. Cantwell*, 108 N. Y. 268; *Fleming v. Burnham*, 100 N. Y. 10; *Post v. Hover*, 33 N. Y. 602; *Moore v. Appleby*, 36 Hun, 371; *Campbell v. Stokes*, 142 N. Y. 23.) If the provision for the widow is invalid, she still has an interest in the estate, dower and a distributive share of the personalty. (1 R. S. 727, 729, §§ 45, 60, 61; *Adams v. Perry*, 43 N. Y. 496; *In re Livingston*, 34 N. Y. 555; *Stevenson v. Lesley*, 70 N. Y. 512; *Warner v. Durant*, 76 N. Y. 133; *Robert v. Corning*, 89 N. Y. 240; *Goebel v. Wolf*, 113 N. Y. 405; *Livingston v. Greene*, 52 N. Y. 118; *Hawley v. James*, 16 Wend. 188; *In re Mahan*, 98 N. Y. 376; *Wimple v. Fonda*, 2 Johns. 288; *Radley v. Kuhn*, 97 N. Y. 35.) The construction of the will, adopted by the Special Term and Appellate Division, makes the whole trusts to continue through more than two lives in being, and makes the whole trusts void as violating the statute against perpetuities. (*Cotting v. Schermerhorn*, 35 N. Y. S. R. 125; *Colton v. Fox*, 67 N. Y. 348; *Tilden v. Green*, 130 N. Y. 50; *Benedict v. Webb*, 98 N. Y. 460; *Holly v. M. R. Co.*, 9 Misc. Rep. 702; *Amory v. Lord*, 9 N. Y. 411; *Clemens v. Clemens*, 60 Barb. 369; 37 N. Y. 59. *Brandt v. Brandt*, 68 N. Y. S. R. 412.)

Francis M. Finch for appellant. The testator gave to the son's widow, directly and without intervention of trust or trustee and as a legal instead of an equitable estate, the one-half of the income of half of the residue and remainder. (*Matteson v. Matteson*, 51 How. Pr. 276; *Griffen v. Ford*, 1 Bosw. 123; *Mason v. Jones*, 2 Barb. 229; *Manice v. Manice*, 43 N. Y. 303; *Purdy v. Hayt*, 92 N. Y. 456.) All the admitted canons of construction forbid the theory that the legacy of income to Mrs. Pomeroy was involved in the trust and covered by it. (*Vanderpoel v. Loew*, 112 N. Y. 184; *Wright v. Drew*, 10 Wheat. 239; *Daves v. Swun*, 4 Mass. 208.)

Thomas Raines for respondents. The intention of the testator governs. The general intent overrides any particular intent. That intent is to be ascertained from the language of the will, and when that is expressed in unambiguous language no interpretation is required. (Potter's Dwarrior on Stat. 126; 2 Jarman on Wills, 743.) The provisions of the will relative to the contingency of Rhea leaving a widow and no child are void under the statute, as they suspend the power of alienation for a period of more than two lives in being at the execution of the will and at the death of the testator. (*Underwood v. Curtis*, 127 N. Y. 537; *Coster v. Lorillard*, 14 Wend. 265; *Cross v. U. S. T. Co.*, 131 N. Y. 330; *Lee v. Tower*, 124 N. Y. 375; *Schettler v. Smith*, 41 N. Y. 328; *Gott v. Cook*, 7 Paige, 521; 24 Wend. 641; *De Kay v. Irving*, 5 Den. 646; *King v. Rundle*, 15 Barb. 145; *Brown v. Evans*, 34 Barb. 605; *Yates v. Yates*, 9 Barb. 345; *Savage v. Burnham*, 17 N. Y. 561; *Oxley v. Lane*, 35 N. Y. 340.) The counsel for defendant Frances endeavors, by an extremely forced construction of the provisions of the will relating to the possible widow of Rhea, to change such widow to a legatee from a beneficiary and *cestui que trust*. He claims that the income comes to her as a legacy, and that by the words "give, devise and bequeath" such income is taken entirely out of the general trust; and that the testator so intended. This position is untenable. (*In re Truslow*, 140 N. Y. 605; *Noyes v. Blakeman*, 6 N. Y. 567; *Marx v. McGlynn*, 88 N. Y. 357; 1 R. S. 2179, § 16; *Underwood v. Curtis*, 127 N. Y. 523.) The claim of the appellant, that if the provision for a possible widow of Rhea be held to be invalid all the trusts declared in the will must also be held invalid, and that Dr. Pomeroy died intestate as to the entire residuary estate, is not well founded. (*Griffen v. Ford*, 1 Bosw. 123.) The suggestion that Frances Pomeroy has a dower and a distributive share of the personalty is unsound. (*Smith v. Rockefeller*, 3 Hun, 295; *Cow v. Robertson*, 5 N. Y. 125; 2 Wms. on Exrs. [5th ed.] 125; *Newell v. Nichols*, 75 N. Y. 78; *Rushmore v. Rushmore*, 12 N. Y. Supp. 776.) The

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appellant has no equities superior to those of the heirs of Dr. Pomeroy. (*Tiers v. Tiers*, 98 N. Y. 568.)

BARTLETT, J. This is an action to construe a will and the courts below have held that the widow of testator's son was provided for in a trust, void as to her, for the reason that it created an illegal suspension of the power of alienation. In other words, the will is held to have created but a single trust, and that it is only invalid as to the widow of the son, but stands for all other purposes. We are unable to adopt this construction, and before deciding the effect that must be given to the instrument, it is proper to consider the situation of the testator at the time he decided upon the testamentary scheme which appears not only on the face of the will, but is justified by those considerations that must have acted upon his mind in forming that intention which is manifested in the final disposition of his estate.

The testator was a prominent physician, possessed of an estate consisting of several farms, a hotel, five dwelling houses, a homestead and considerable personal property. He left two children, a married daughter and an unmarried son; the daughter had two minor children; the son was dissipated. The testator was a widower, but his deceased wife's sister, Eurette Miles, resided in his family.

If anything is absolutely clear in the scheme of the will it is the intention of the testator that his property should follow his blood in the ultimate disposition thereof, and that the widow of his son, if such a contingency ever presented as the death of the son leaving a widow and no children, should be entitled to a certain portion of the income of the estate only so long as she remained unmarried.

The testator was confronted by the task of dealing with two distinct and entirely different situations. The first was to determine how he should provide for his unfortunate son, about thirty-one years of age at the time the will was executed in 1884, who might survive for many years, marry, have children, and possibly forsake his evil habits. The second was to

provide for a daughter with a living husband and minor children, and secure a portion of his property to the latter.

In view of this state of affairs it was natural that the testator, when he came to dispose of the residue of his estate, should seek to carry out his scheme by the erection of two distinct trusts. An inspection of the will discloses a plan in entire harmony with the motives that influenced the testator when he drew it.

In the first clause he devises the homestead to his son for life, and after his death, if he leaves a wife with children, a life estate in wife and fee to children. If the son died childless, the testator's daughter took a life estate and the fee went to her children.

We have here a clear indication of the manner in which the testator proposed to deal with the widow of the son. He seemed to contemplate her existence as not only possible, but probable, and carefully guards the fee of his real estate so that it shall follow his blood. This provision as to the homestead shows the affectionate regard and solicitude entertained by the testator for his son.

The second clause bequeaths certain valuable personal property to the son, and is only important as emphasizing testator's love for him. The third clause creates a separate trust in favor of the son, and the fourth clause erects still another dealing with the interests of the testator's daughter, husband and children.

The third clause is in one respect inartificially drawn, but there is no serious difficulty in construing it, and the intention of the testator is clear. It opens with the formal words devising and bequeathing the residue of his property to his executors for the purposes of certain trusts.

These words may be treated as merely introductory, as they are followed by apt language in the third and fourth clauses creating separate trusts, each embracing one-half of the residuary estate. These trusts are not only separated by the arrangement of the will on its face, but in substance and subject-matter.

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The trust for the son opens with the following language: "The equal one-half of said rest, residue and remainder of my said property and estate I will, devise and bequeath to my said executors and their successors, in trust, to receive the rents, issues, income and profits (including one-half of the interest on moneys invested) thereof, and pay and apply the same to and for the use of my son, Rhea B. Pomeroy, until he shall arrive at the age of forty-five years, if he shall so long survive, or in case my said son Rhea should not live to reach the age of forty-five years, then to apply the same to the use of my said son during his life."

As the son died before he attained the age of forty-five years, we need not examine those provisions regulating the manner in which the trustees were to deal with him and his interests after he attained that age. It suffices to say that the trust was measured by the duration of his life only. The trust provided that the executors could sell no real estate without the son's consent, and he was to advise as to rebuilding and repairs.

It also provided that, if the son died leaving a child or children, the executors should convey the half of the residue of his estate to such child or children absolutely.

This is of no importance save as it still further shows the regard which the testator had for his son and his children, if any should be born to him.

The son died childless, but he left a widow, and this brings us to the disputed clause in the will. It reads: "If he, in such event of his death, within the period last aforesaid" (forty-five years); "should leave no child or children him surviving, but should leave a wife him surviving, then she is to have and I devise and bequeath to her one-half of the income of the said half of the rest, residue and remainder of my said property, so long as she shall remain his widow, unmarried; the other one-half of said income is to be held by my said executors or their successors, and paid by them to and for the use of my daughter, Eliza A. McIntyre. In case the wife of my said son should marry again, then the share of said

income so bequeathed to her is to go to my daughter, Eliza A. McIntyre, if she then survives; if not, to her children."

In the courts below the trust for the daughter in the fourth clause, which conveys to the executors in separate and apt words the other half of the residue of the estate in trust for the benefit of the daughter, including her husband and children, is blended with the son's trust and treated as a single trust, and the clause just quoted in favor of the son's widow is declared void, for the reason that it contains an attempted suspension of the power of alienation of a portion of testator's property beyond the period permitted by statute, as the son did not marry until after the death of the father, and there was the possibility that he might take as wife one not in being at testator's death.

We are not called upon to pass upon the correctness of this decision, supported as it is claimed by *Schettler v. Smith* (41 N. Y. 328), as the existence of two distinct trusts renders it unnecessary, but we do not wish to be regarded as yielding even an implied assent to the decision of the court below, or the binding force of the authority cited, by reason of our resort to a different construction of this will.

Treating the trust for the benefit of the son as distinct from his sister's trust, we have now to consider the effect of the son's death upon the principal of the fund.

A reading of the provisions for the benefit of the son's widow, that we have already quoted in full, shows that when the testator vested in the widow the right to one-half of the income of the trust estate during her widowhood or life, if she never remarried, he uses very different language than that employed by him when he secures the other half of the income of this trust share to his daughter.

When dealing with the son's widow he says, "she is to have and I devise and bequeath to her," etc. As to the other half of the income he says, "it is to be held by my said executors or their successors and paid by them to and for the use of my daughter, Eliza A. McIntyre."

The legal effect of the son's death was to terminate the

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trust for his benefit, and the devise and bequest of one-half of the income of the principal theretofore tied up in the trust, to his widow, vested in her a legal estate in one half of the principal, real and personal, to wit, a life estate during her widowhood, under the familiar principle that a gift of the rents and profits of land, or gift of the income arising from personal property, vests such an estate in the devisee or legatee as conforms to the evident intention of the testator. (*Paterson v. Ellis*, 11 Wend. 298; *Smith v. Post*, 2 Edw. Ch. 527; *Hatch v. Bassett*, 52 N. Y. 362; *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 146.)

During the time the son's widow remains unmarried, which may be her life, she is, by virtue of her life estate, a tenant in common with the owners of the principal of the share which was released from the trust for the benefit of the son by his death.

The fact that the executors, as such, may have to deal with the income of the vested interests in order to carry out the provisions of the will does not create any illegal suspension. (*Gilman v. Reddington*, 24 N. Y. 9-18.)

It is clear that the provision for annual repairs of the homestead in the first clause of the will, and for the support of Eureka Miles in the sixth clause, and for the erection of a monument in the seventh clause, are no part of the trusts created for the son and daughter respectively, but are general charges upon the entire income of the estate, which must be paid by the executors as such and not by them as trustees.

These charges will of course diminish the income of the trust estates, and all interests which vested at the termination of the son's trust are subject to their payment in due proportion.

It is very common to make annuities, or other payments, a charge upon an entire estate without regard to whether it is carved up into trusts or vested interests, and such a lien is a testamentary incumbrance which follows the estate under all the provisions of the will.

We have not considered it essential or proper to decide all

of the questions which were deemed presented by the court below.

This appeal requires us to determine the interest in the estate of the testator of the defendant and appellant, Frances Pomeroy, the widow of Rhea Pomeroy.

This question we have decided.

The judgments of the Special Term and Appellate Division should be reversed and judgment ordered for the appellant Frances Pomeroy in accordance with this decision, with costs to her in all the courts payable out of the estate.

All concur, except HAIGHT, J., absent.

Judgments reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOSHUA S. HELMER, Appellant.

1. CRIMES—JURISDICTION OF COURT OF APPEALS. The Court of Appeals cannot review any questions of fact on appeal in a criminal case, except where the judgment is of death; nor can it review any questions relating to the sufficiency of the evidence, where the Appellate Division has affirmed a conviction, by a unanimous decision. (Const. art. 6, § 9.)

2. INDICTMENT—PENAL CODE, § 592. The mere omission of the words "in respect thereto," from an otherwise sufficient indictment, based upon section 592 of the Penal Code, which makes it a crime for an officer of a corporation to knowingly exhibit a false book to any public officer authorized by law to investigate its affairs, "with intent to deceive such officer in respect thereto," does not invalidate the indictment.

3. CHARGE TO JURY—ERROR. Where the charge to the jury is erroneous, the verdict must be set aside, unless it is apparent that the error did not and could not have affected the verdict; and it is not for the defendant to show how he was injured by it, but it rests with the prosecution to show that no possible injury could have arisen from the error.

4. REVERSIBLE ERROR IN CHARGE. On a new trial of an indictment based upon section 592 of the Penal Code, charging the president of a state bank with having knowingly exhibited a false tickler or cash book to a bank examiner, the questions most seriously litigated were whether certain entries in the book were false to the knowledge of the defendant and whether, with that knowledge, he exhibited the book to the examiner. The evidence to establish these facts was somewhat circumstantial. The trial court, in charging the jury, after detailing the evidence, added:

154	596
5169	1843

154	596
172	*243

"And, as the court at General Term had said, in this case, that was sufficient to satisfy the jury that there was an inspection or presentation of the books to the examiner." *Held*, that this constituted reversible error.

People v. Helmer, 13 App. Div. 426, reversed.

(Argued December 3, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 3, 1897, which affirmed a judgment of a Court of General Sessions, held in and for the county of Niagara, convicting the defendant of exhibiting false books to one of the bank examiners of the state.

The defendant was indicted at a Court of Oyer and Terminer held in and for that county in April, 1894. At the time of the alleged offense he was president of the Merchants' Bank of Lockport, which was duly organized under the laws of this state, and was in general charge of its affairs. Among other books kept in the bank was one known as the tickler or cash book, which purported to show correctly the cash on hand at the close of business on each day. B. S. W. Clark was a bank examiner duly authorized and appointed to investigate the affairs of that bank. On the morning of the twenty-first of September, 1893, Clark, as such examiner, appeared at its banking office for that purpose. The defendant was present and was informed by the bank examiner of the purpose of his visit and of his desire to count the cash before the bank opened for business. The books were thereupon presented, including the tickler or cash book, and the examination commenced. The defendant was present the most of the time until it was concluded.

John G. Milburn, Tracy C. Becker and Eugene M. Ashley for appellant. The offense charged in the indictment as to the teller's tickler is not sustained by any evidence. (*Wood v. E. R. Co.*, 72 N. Y. 196; *People v. Rosenberg*, 138 N. Y. 415.) Even if the defendant did exhibit the teller's tickler to the examiner, and knew that the checks were recorded in it under the head of currency, it was not a false book within the meaning of the statute. (*People v. Richards*, 108 N. Y.

137.) The case made, being perfectly consistent with innocence, it is well settled that a conviction will not be allowed to stand, and the motion to dismiss the indictment and discharge the defendant brings this question up for review by this court. (*People v. Ledwon*, 153 N. Y. 10; *People v. Bennett*, 49 N. Y. 137; *People v. Owens*, 148 N. Y. 648.) Section 592 of the Penal Code does not cover an ordinary examination of the affairs of a bank by a bank examiner. (*People v. Molyneux*, 40 N. Y. 118; *Drake v. State*, 144 N. Y. 414; *People ex rel. v. Davenport*, 91 N. Y. 574; *People v. Richards*, 108 N. Y. 137.) The defendant was deeply prejudiced by the submission to the jury of the quarterly statement made to the banking department on the 27th day of September, 1893. (Code Crim. Pro. § 527.) The indictment was defective in failing to charge that it was presented with intent to deceive the bank examiner "with respect thereto." (*Lohman v. People*, 1 N. Y. 379.) It was error not to allow the defendant to show his knowledge that during the year 1893 all the banks of the city of Lockport were receiving on deposit and carrying as cash checks of private individuals. (*Kerrains v. People*, 60 N. Y. 221.)

Abner T. Hopkins and *P. F. King* for respondent. The decision of the Appellate Division being unanimous, this court has no jurisdiction to review its decision. (Const. N. Y. art. 6, § 9; *Harroun v. Brush El. L. Co.*, 152 N. Y. 212; *People ex rel. v. Cullen*, 151 N. Y. 54; *People ex rel. v. Barker*, 152 N. Y. 417; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 220.) The evidence fully sustains the conviction. (L. 1892, ch. 689; *People v. Rathbone*, 145 N. Y. 434; *Dempsey v. N. Y. C. & H. R. R. Co.*, 146 N. Y. 290; *People ex rel. v. Common Council of Brooklyn*, 77 N. Y. 503; *Rowland v. Mayor, etc.*, 83 N. Y. 372; *People ex rel. v. Nostrand*, 46 N. Y. 375; Penal Code, § 592; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 220; *People v. Helmer*, 85 Hun, 530; *People v. Conroy*, 97 N. Y. 62; *People v. Baker*, 96 N. Y. 340; *People v. Bennett*, 49 N. Y. 144; *Poole v. People*, 80 N. Y.

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645.) The examination of the Merchants' Bank, it being a corporation, was clearly within both the letter and the spirit of section 592 of the Penal Code. (*McCluskey v. Cromwell*, 11 N. Y. 601; *Purdy v. People*, 4 Hill, 397; *People v. Lambier*, 5 Den. 9; *People ex rel. v. Davenport*, 91 N. Y. 585; Penal Code, § 611.) Every question of fact was clearly and fairly submitted to the jury. (*Szuchy v. H. C. & I. Co.*, 150 N. Y. 220.) The quarterly report was introduced in evidence and submitted to the jury without objection or exception. No question relative thereto can be considered by this court. (Const. N. Y. art. 6, § 9; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 220; *People v. Conroy*, 97 N. Y. 62; *People v. Cusey*, 72 N. Y. 393; *People v. Greenwall*, 115 N. Y. 520; *Mayer v. People*, 80 N. Y. 364; Abb. Tr. Brief, § 598; *Bielshofsky v. People*, 3 Hun, 40.) The words used in the indictment convey the same meaning as those used in section 592 of the Penal Code, and are, therefore, sufficient. (*People v. Conroy*, 97 N. Y. 62; Wharton's Cr. Pr. & P. § 236; *People v. Clements*, 107 N. Y. 205; *People v. Williams*, 92 Hun, 354; 149 N. Y. 1; Code Crim. Pro. §§ 282-285, 684.)

MARTIN, J. The jurisdiction of this court is limited to the review of questions of law only, and no unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain a verdict not directed by the court can be reviewed by the Court of Appeals. (Const. art. 6, § 9; *Szuchy v. Hillside Coal & Iron Co.*, 150 N. Y. 219; *People ex rel. v. Barker*, 152 N. Y. 417; *Harroun v. Brush Electric Light Co.*, 152 N. Y. 212; *People v. Ledwon*, 153 N. Y. 10, 15.) Consequently no questions of fact, or questions relating to the sufficiency of the evidence, can be reviewed on this appeal.

The indictment was based upon the provisions of section 592 of the Penal Code, which, so far as material, provide that an officer of a corporation, who knowingly exhibits a false book to any public officer authorized by law to investigate its affairs, with intent to deceive such officer in respect

thereto, is punishable by imprisonment not to exceed ten years. At the close of the testimony the defendant moved to dismiss the indictment upon the ground that it did not charge a crime. This motion was denied and the defendant excepted. He now contends that the indictment was defective in failing to allege that the tickler or cash book was exhibited by the defendant to the bank examiner with intent to deceive him *in respect thereto*. The indictment in effect charged that the defendant, as president and director of the Merchants' Bank of Lockport, at the time named, feloniously, willfully, wrongfully and knowingly presented, exposed and exhibited its cash book or tickler to B. S. W. Clark, a public officer duly authorized and commissioned to investigate the affairs of that bank, with intent to deceive such public officer, contrary to the form of the statute in such case made and provided. The only omission claimed is of the words "in respect thereto." While it may be that under the strict and technical rules of the common law this indictment might be regarded as defective, yet, under the liberal procedure established by our statutes we think it was sufficient. Under the present practice, an indictment is sufficient if the act or omission, charged as a crime, is plainly and concisely set forth with such a degree of certainty as to enable the court to pronounce judgment according to the right of the case, and no indictment is insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. Nor does any error or mistake therein render it invalid, unless it actually prejudices or tends to prejudice the defendant in respect to a substantial right. (Code Criminal Procedure, §§ 284, 285, 684.) The purpose of an indictment is to identify the charge against a defendant, so that his conviction or acquittal may inure to his subsequent protection, and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prepare his defense. When tested by these principles it is obvious that the indictment was sufficient, as there was no defect which affected any substantial right of the defendant. It fairly

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apprised him of the facts to be proved against him, and so clearly identified the crime charged that a judgment would protect him from a subsequent conviction. Hence, we are of the opinion that the defendant's exception to this ruling was not well taken.

The defendant's counsel also insists that the court erred in admitting in evidence the quarterly report of the Merchants' Bank, showing its condition on the nineteenth day of September, 1893, which was signed and verified by the defendant. It was proved upon his cross-examination, and was obviously admissible to contradict his testimony. As it was, however, received without objection or exception, it presents no question which can be reviewed upon this appeal.

On the trial the questions most seriously litigated were whether certain entries in the tickler or cash book were false to the knowledge of the defendant, and whether, with that knowledge, he exhibited it to the bank examiner. The evidence to establish these facts was to some extent circumstantial. In submitting the case to the jury, the learned trial judge, after charging that there was no direct evidence to show that the defendant exhibited this book to the bank examiner, and that he was in and about the bank and knew the purpose of the visit of the examiner, then added: "And, as the court at General Term had said, in this case, that was sufficient to satisfy the jury that there was an inspection or presentation of the books to the examiner." That part of the charge was excepted to by the defendant, and this exception presents the only serious question in the case. The possible effect of that portion of the charge was to convey the idea that the General Term had determined the precise question which was before the jury. It is manifest that this statement was improper, as the question whether the defendant had knowingly exhibited false books to the examiner was purely one of fact to be determined by the jury from the evidence before it, unprejudiced by any statement as to what another court might have said upon that subject. The obvious conse-

quence of that portion of the charge was to create a tendency on the part of the jury to rely upon what it may have understood to have been the decision of the General Term, rather than upon the evidence. While it may be that it had no such effect, still, as such a result may have been produced, it cannot be said that the error was harmless. Where a charge is erroneous the verdict must be set aside, unless it is apparent that the error did not and could not have affected the verdict. It is not for the defendant to show how he was injured by it, but it rests with the prosecution to show that no possible injury could have arisen from the error. (*Greene v. White*, 37 N. Y. 405; *Clarke v. Dutcher*, 9 Cow. 674; *Stokes v. People*, 53 N. Y. 164; *People v. Corey*, 148 N. Y. 476; *People v. Strait*, 154 N. Y. 165; *People v. Koerner*, 154 N. Y. 355.) We are of the opinion that the defendant's exception to the charge was well taken, and as we cannot say that it could by no possibility have prejudiced the defendant, it follows that the judgment must be reversed and a new trial granted.

O'BRIEN, J. (dissenting). The defendant was convicted of a felony under § 592 of the Penal Code, upon an indictment charging him with having exhibited to an examiner of the bank department a false book concerning the condition of a state bank, of which he was the president, and which subsequently failed. On the argument of the appeal in this court his counsel insisted that there was no evidence whatever in the case upon which the issues of fact could properly have been submitted to the jury. On the part of the People this contention is answered by the suggestion that whether there was evidence or not this court has no jurisdiction to look into the record for the purpose of ascertaining that fact, or to examine such a question when the Appellate Division has affirmed the conviction by a unanimous vote, as it has in this case. The principle is of so much importance, and the decision of the majority of this court upon the point is such a wide departure from what seems to me to be the law of the case, that I am constrained to dissent from the doctrines of the

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prevailing opinion, which sustains the contention of the prosecution.

The point is made by the district attorney that when an issue of fact has been joined upon an indictment and a conviction for any offense, not punishable by death, is followed by unanimous affirmance at the Appellate Division, that this court is deprived of all jurisdiction to examine the record to see whether the accused has been convicted upon evidence, or without any evidence whatever. If this proposition be correct, then all appeals to this court in such cases ought to be prohibited, since, if we have no power to examine such a vital and fundamental question, we should not be required to listen to arguments that deal only with the competency or relevancy of questions propounded to witnesses, or with the language in which the trial judge may have instructed the jury. The most important question in a criminal case is whether the accused is innocent or guilty, and that must always depend upon the evidence. But if we must shut our eyes against the record and cannot be permitted to inquire whether, in any case, where the court below is unanimous, any evidence has been produced against the accused, then, certainly, all minor questions ought to follow the principal one.

The contention of the learned district attorney practically asserts that in all such criminal cases the most important question of law must be regarded as finally determined by the unanimous decision of the Appellate Division, and that this court can deal only with questions that are generally insignificant. Since this court is disposed to sustain the contention of the district attorney, that we have no power to inquire whether the defendant was convicted with or without evidence, the reasons for such a conclusion certainly merit some examination. The general ground upon which the conclusion rests is that the power which this court has always exercised, to examine and decide all questions of law in criminal cases that come properly before it, has been withdrawn by force of article 6, § 9, of the Constitution. It is clearly provided in that section that, except where the judgment is of death, the jurisdiction of this court

shall be limited to the review of questions of law. But the question before us, whether there is any evidence to sustain the verdict, *is* a question of law, and nothing else. Since the decision of Lord MANSFIELD in the case of *Carpenters' Company v. Hayward* (1 Doug. 374), it is elementary law that the question whether there is *any* evidence is for the court, and whether sufficient evidence, is for the jury. (1 Greenleaf Ev. § 49.) When the trial judge was requested to decide that there was no evidence to submit to the jury, this request raised simply a question of law, and that is the very question that is now before us, but which the court declines to entertain for want of jurisdiction. The nature of the question was stated in this court by Judge GROVER in the case of *Mason v. Lord* (40 N. Y. 476), in this language: "An appeal to this court can only be taken upon the law. The question, then, is, whether finding a fact without any evidence to sustain it is an error of law. The statement of the question would seem to suggest the answer: A finding of facts must always be based upon evidence, and where none is given tending to show an affirmative fact, it is contrary to law to find such fact against a party traversing it. * * * When the alleged error is a finding of fact contrary to the weight of the evidence, it is within the meaning of the Code providing for appeals an error of fact, of which this court can take no cognizance. When it is the finding of a fact without any evidence, or the refusal to find a fact proved by uncontroverted evidence, it is a legal error which is available in this court." This court has so often held that such a question is, in its very nature and substance, a purely legal question, that it is idle to pursue such an inquiry. It follows, therefore, that the present Constitution by enacting that the jurisdiction of this court should be confined to questions of law, has not made any new rule in criminal cases. This court never had any jurisdiction to review facts in a criminal case, except in capital cases, and the Constitution made no change in the practice in that respect. It will be seen, therefore, that the question we are now considering is a question of law and nothing else.

The limitations upon appeals to this court are embraced in three sentences of article 6, § 9, of the Constitution. When these limitations are carefully analyzed it is plain, I think, that they have no application to criminal cases and that they relate wholly to appeals in civil cases. This section of the Constitution provides that, except where the judgment is of death, appeals may be taken as of right to this court, only from judgments or orders entered upon decisions of the Appellate Division finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellant stipulates that, upon affirmance, judgment absolute shall be rendered against him. The two provisions to which I have referred clearly point out the cases and the questions that may be brought to this court, as well as the tribunal from which the appeal must be taken. The questions must be questions of law. The appeal must come from the Appellate Division, and only from such judgments and orders described, when claimed as matter of right. The question then is, whether these limitations have any application to this case, or any other criminal case. My brethren think that they do apply to criminal as well as to civil cases, and it is quite evident that they have been greatly influenced in arriving at that conclusion by the fact that, in both of these clauses of the section, judgments of death are mentioned by way of exception. It seems to me that this view is quite misleading. The purpose and intention of the lawmakers in inserting these words of exception are very plain. But for the exception in the first clause it might be claimed that the jurisdiction of this court to review the facts in a capital case was withdrawn, and in the second clause the exception was clearly intended for no other purpose than to enable the court to continue to entertain appeals in the same class of cases directly from the trial court. In other words, capital cases were excepted from the requirement that appeals must be taken only from the Appellate Division and on questions of law. It is perfectly plain that the intention was to preserve the jurisdiction of this court in capital cases, just as it was before,

from the application of the general words of the Constitution confining jurisdiction to questions of law and to appeals from the Appellate Division. Since, in all other criminal cases, appeals could only be made under existing laws from the Appellate Division and on questions of law, it was not necessary to except them from the general words in order to retain the same jurisdiction over them that we had before. But, singularly enough, the attempt of the framers of the Constitution to preserve the jurisdiction of this court in all criminal cases, just as it had always existed, is now used as an argument to show that they intended to change and limit it. Words which are obviously words of exception are made to perform the office of words of inclusion, and the argument is made that since capital cases are excepted from the limitations of the Constitution, all other criminal cases must necessarily be included. I confess I am wholly unable to understand or appreciate the argument against our jurisdiction over all the questions presented by the record in this case which is based upon those words of exception in the section. The office of the exception was to exclude from the limitations the cases excepted. It did not operate to draw any other cases in.

But a little closer analysis of the words of the section will dissipate all doubt derived from a careless reading. It is clear, beyond any dispute, that by the provisions of the section, appeals to this court as matter of right, can be made in three cases only: (1) Judgments finally determining actions. (2) Final orders in special proceedings. (3) Orders granting new trials upon exceptions where the appellant stipulates that judgment absolute may be rendered in case of affirmance. It is these three classes of appeals that the section regulates and prescribes the powers and duties of this court upon the hearing. When we are forbidden to review any particular question of law, it must be some question embraced in a record before this court in some one of the three cases mentioned, for no other cases can come here under that section as matter of right. Now, if it can be shown that the three classes of

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cases mentioned in the section are civil cases only, then it will be demonstrated that the limitations of the section upon appeals to this court have no application to criminal cases, but that they have been left by the Constitution just where they were before, regulated by statute and under the power of the Legislature. It must be admitted that in civil cases, at least, no appeal can be taken to this court, as matter of right, from any decision unless it comes within one of the three classes above mentioned, and the Legislature cannot enlarge the jurisdiction, since the Constitution forbids it. The language is that appeals may be taken *only* from the judgments and orders there specified. But, obviously, this limitation has no reference whatever to criminal cases. Let us examine the three classes designated, in the inverse order in which they are enumerated in the Constitution and see if this is not so.

(1) Appeals from orders granting new trials on exceptions, where the party stipulates that judgment absolute may be given against him in case of affirmance. I assume that no one will claim that any appeal which is conditioned upon a stipulation for judgment absolute could possibly have any application to a criminal case, or that a person charged with a crime was obliged to, or could, stipulate in writing for his own conviction. It is hardly necessary to say that such an appeal was never known to criminal procedure, whereas, it has long been familiar to the practice on the civil side of the court. The notion that such an appeal applies to criminal cases is so absurd that this class of appeals need not be further considered.

(2) Appeals from final orders in special proceedings. A special proceeding is a civil remedy. It was always known as such and is so expressly defined by statute. (Code Civ. Pro. sec. 3343.) The authors of the Constitution used the term in the sense in which it was generally understood. The record before us shows that the defendant was prosecuted upon an indictment for a public offense. It is not conceivable that any one will contend that it was a special proceeding within the meaning of the Constitution. This disposes of two of the three classes of appeals that the Constitution deals with.

(3) But one other class remains to be considered, and that is appeals from final judgments which determine actions. What is an action? The term has been used in the law for ages. In its primary and popular sense it had no application to a criminal prosecution. It applied to a claim or demand made before a tribunal to secure some civil right or to prevent or redress some civil injury. It was not used in the common law to describe a proceeding for the punishment of a crime, any more than it was in military law to describe a proceeding for the punishment of a military offense. In recent times the term has been defined by statute in words broad enough to embrace a proceeding for the punishment of a public offense by indictment, but the lawmakers were careful, in order to avoid confusion, to classify actions and to define a prosecution for the punishment of a public offense by indictment and trial as a *criminal* action. (Code Civ. Pro. § 3333, &c.; Code Cr. Pro. § 5.) It is significant that the authors of the Constitution said nothing about criminal actions or crimes, but used the word "action" in its primary and popular sense, and, therefore, as applicable to civil actions only. When we look for the general definition of the word, as used in the law, we find that it does not include a criminal prosecution and in most definitions that sense is expressly excluded. (Burrill; Bouvier; Century Dic.; Stimson's Law Glossary.)

There can be no mistake with respect to the language of the section. It permits appeals in only the three cases that have been mentioned, and each class is designated in careful and accurate terms, that is, final judgments in actions, final orders in special proceedings, and orders granting new trials where stipulation for judgment absolute is given. By no refinement of thought or language can there be a place made in any of these three classes for an appeal in a criminal case. How can the limitations of the section possibly apply to appeals other than the classes there designated? When we hold that the restrictions of the section apply to all appeals that this court may entertain, then the conclusion is irresisti-

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ble that the Constitution permits no appeals in any criminal case to this court, since they do not fall within any of the three classes to which our jurisdiction is there limited. This dilemma can be escaped only by adopting the obvious and more rational view that the restrictions apply only in civil cases.

We can then look for the right of appeal in such cases, and the power of the court with respect to the questions to be reviewed, elsewhere than in the Constitution, and we find it, as we shall see hereafter, in the statute law on the subject, which has not been affected in the least by the limitations referred to, but remains, except as to some verbal changes adopting the new names given to the several courts, just as it was before.

But this is not all that may be said concerning the meaning of the word actions, as used in the section of the Constitution now under consideration. The meaning of a word is frequently determined from the company in which it is found; and when the eminent lawyers who framed this section associated together in the same section actions, special proceedings and orders granting new trials, with a stipulation for judgment absolute, it would simply be a perversion of language to hold that they had any reference to criminal cases. Moreover, if the phrase, "final judgments determining actions," has any application to criminal cases, then, clearly, a judgment entered upon a verdict of acquittal would be such a judgment, since it certainly determines the action, if action it be, and is final in its nature. It would then follow that the People had now the right to appeal to this court from a judgment in a criminal case where the accused was acquitted by the jury, something that was never known before, and, of course, was not intended.

We will presently see what havoc the construction of the Constitution contended for by the People in this case must inevitably play in other directions with the whole statutory plan of criminal procedure as it exists in this state. But there is still another provision in the section of the Constitution so

often referred to that must be noticed. "No unanimous decision * * * that there is evidence supporting, or tending to sustain, a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals." This is supposed to be the edict that has swept away our jurisdiction to review the most substantial question in this record, or that can appear in any criminal record. By section one of the judiciary article of the Constitution, the jurisdiction of this court, as it previously existed, is retained, except so far as it might be inconsistent with that article. The Code of Criminal Procedure was then in force and had been for several years, and in that statute our jurisdiction in criminal cases was clearly defined and regulated. That same jurisdiction, and all other laws not repugnant to the Constitution were expressly retained, and remain untouched. All the changes and limitations with respect to our power to review cases upon appeal were expressed in the new Constitution in a single section of four sentences, and the provision above quoted is one of them. What is its true scope and meaning? Most clearly it has, in certain cases, withdrawn from this court the power to review a specified question of law that it had the power to review before and had freely exercised. That question of law was the one I have already explained, namely, whether there is or is not evidence in the record supporting or tending to sustain a finding of fact or a verdict not directed by the court. But in what cases was the power to review this question withdrawn? Certainly not in criminal cases, which the section did not deal with at all, but only in the three cases where the right of appeal depended upon the provisions of that section, and it has been shown that these were civil cases and nothing else.

If anything more is needed in support of this proposition it can be found in the language of the limitation itself. A *finding of fact* has no proper application to the result of a trial of an indictment. While, of course, facts are found, yet the determination of the jury in such a case was never, I venture to say, expressed in the fundamental law of any state by such words. A verdict certainly does apply to such a case,

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but the word has been carefully qualified in the provision, and there it is "a verdict not directed by the court." Who ever heard, at least in modern times, of a verdict in a criminal case directed or not directed by the court? In civil cases such an expression has a definite meaning, and is well understood, since the court has power to direct a verdict for the plaintiff or the defendant according to the proof; but the terms are wholly out of place in criminal procedure. And here, again, when we find the authors of the Constitution associating together, in order to express a distinct idea, such words as a *finding of fact*, or a verdict *not directed by the court*, the conclusion is plain that they had reference to civil and not criminal cases.

It must always be borne in mind that section nine deals only with the classes of appeals there distinctly specified, and whether these appeals, or any of them, include criminal cases is the pivot of the whole question. It will be observed that the limitation now under consideration applies to a *decision*. It is called a unanimous decision of the Appellate Division. What does the word decision here mean? It is used in the plural form in the next sentence of the section providing that appeals may be taken of right only from judgments or orders entered upon *decisions* of the Appellate Division. In both cases the word is used in the same sense and refers to the same thing, and this court has so expressly decided. (*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 434.) It is plain, then, that it must refer to the formal judicial determination which authorizes the entry or enrollment of the judgments and orders designated in the section; that is to say, final judgments in actions, final orders in special proceedings, and orders granting new trials. It has been shown that those are judgments and orders in civil cases, and cannot possibly be anything else, and, if I am right in that, it must follow that the *decisions* specified in the two sentences of the section must be decisions in civil cases only, and hence the "unanimous decision" referred to in the limitation must be a decision in a civil case. Whoever claims that it can possibly have any reference to a criminal

case should be able to show that such cases are embraced within the three classes designated.

I have now examined each of the three provisions of section 9, which embodies all the limitations that the Constitution has imposed upon appeals to this court. That section, as we have already seen, deals only with three classes of appeals, and these classes are, as it seems to me, civil cases only. If the section should be construed to apply to all appeals, it would have the effect of excluding appeals in criminal cases entirely.

It is worthy of note that the lawyers in the convention who framed this section and reported it to the convention, and upon whose advice it was adopted, made no mention, either in the debate, or in any report, of any purpose to interfere with appeals in criminal cases, while the effect it was intended to have upon appeals in civil cases was fully explained and debated; and what is still more remarkable is, that a member of the judiciary committee, who was prominent in framing the section and urging its passage, is the author of two bills which he presented to the legislature in behalf of the bar of the state, revising both the Codes of Criminal and Civil Procedure, in order to bring them into harmony with the changes in the practice which the new Constitution, then adopted, had introduced. His work is found in chapters 880 and 946 of the Laws of 1895. These statutes, enacted for the very purpose of carrying the changes into effect, have great weight in the construction of the limitations upon appeals contained in section nine. The Code regulating the procedure in all civil cases has incorporated in it all the limitations upon appeals that are to be found in the section, in the very words there used. While in the Code regulating the procedure in criminal cases, and defining the right of appeal in such cases to this court, they have all been omitted and the practice left just as it was before. It would be impossible to conceive a weightier example of, not only legislative construction, but construction by the framers of the Constitution themselves. We know that arguments drawn from like

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sources, but far weaker in degree, have settled disputed questions with respect to the meaning of the Federal Constitution, and, therefore, they cannot be out of place here.

When we want to determine what cases and questions this court may review, we always look into the statute to see whether the power has been granted, and if it has been then the only question that can arise is whether the lawmaking body had the power to grant it, or whether it has been abrogated by the Constitution. The Constitution is not a code of practice, but an instrument containing fundamental principles and restrictions. Looking into this statute we find that the legislature has provided for appeals to this court, without any restrictions or limitations whatever, either with respect to the mode of review or the questions to be considered, in at least seven distinct cases that can arise only in a criminal prosecution. They are all to be found in section 519 of the Code of Criminal Procedure, or in statutes that are made a part of it, and the appeal is declared to be a matter of right. It will be profitable to note these cases and we can then see how every right of appeal in criminal cases, as there given, will be shattered by the construction of the Constitution, which is urged by the People in this case.

(1) The defendant only may appeal from a judgment of conviction in a capital case directly to this court from the trial court. No such appeal as this is provided for in the Constitution, though judgments of death are excepted from certain of its restrictions. But the right of appeal cannot be built upon mere words of exception, and we must look for it elsewhere, and it is found in the statute law which the Constitution retained. The appeal which the Constitution provides for is not from a judgment of conviction in a capital case, or other criminal cases, but a final judgment which determines an action. Moreover, the right of appeal specified in section nine is general, and given to the plaintiff as well as the defendant, and if the section applies to criminal cases, the People may appeal as well as the defendant, since there is no restriction in that respect. So that upon the assumption that

the section is applicable to criminal cases, there is now no right to appeal to this court, even in a capital case, unless, indeed, we are driven to hold that a judgment of conviction upon an indictment and a final judgment in an action mean one and the same thing, and that the People may appeal as well as the defendant.

(2) An appeal is also given by the statute to this court from a judgment of the Appellate Division affirming or reversing a judgment of conviction. That appeal may be taken by either party. The appeal now before us is from a judgment affirming a conviction. It is in no proper sense an appeal from a final judgment in an action, and hence is not within the limitations or restrictions of section nine of the judiciary article of the Constitution. The right of the defendant to appeal to this court from a judgment affirming his conviction implies the right to be heard on every question of law disclosed by the record, including the question whether there was any evidence to submit to the jury, and also implies the power in the court to decide all such questions. The Constitution has not abrogated, in the slightest degree, the right or the power.

(3) The statute also gives the right of appeal from a judgment of the same court affirming or reversing a judgment for the defendant on a demurrer to the indictment. Here, again, the original judgment must be one in favor of the defendant. A judgment sustaining or overruling a demurrer to an indictment is, from its very nature, interlocutory. It determines nothing except the sufficiency of a pleading. The guilt or innocence of the accused is not involved, but only a mere preliminary question of law. Such a judgment is in no sense final, much less is it a final judgment which determines an action. This shows that the limitations of section nine have no application to criminal cases, otherwise the right to take such an appeal could not exist and the statute would be unconstitutional, since the section declares that appeals may be taken only from the judgments and orders there specified.

(4) The statute also gives an appeal as matter of right from

an order affirming, vacating or reversing an order of the court arresting judgment. It needs no argument to show that such an appeal is not within the purview of the limitations of section nine, and it is referred to here only for the purpose of exposing the weakness of the contention made in this case, that the restrictions of the Constitution are applicable to criminal cases, since, if they were, such an appeal could not possibly be taken, or authorized without violating the fundamental law.

(5) An appeal is also authorized in a criminal case from a final determination affecting a substantial right of the defendant. Here, again, the appeal is given only when the decision affects the defendant. It is perfectly clear that all appeals of this character to this court have been abolished by the Constitution in civil cases, but no one will contend that they have been abolished in criminal cases, and, if they have not, then what becomes of the contention that the limitations on appeals in section nine apply to both cases alike?

(6) Appeals may also be taken to this court from the Supreme Court by certain charitable institutions, and by parents and guardians when children have been summarily committed to such institutions. Of course, such appeals are not from any final judgment in an action, or from a final order in a special proceeding, or an order granting a new trial, but in summary orders in proceedings of a criminal nature. The case is mentioned here, since it serves to illustrate the wide distinction which the Constitution has observed between appeals in civil cases and in criminal cases. The right to bring such appeals can never be attacked except upon the ground now urged, that criminal cases are within the limitations of the Constitution, and when that proposition is sanctioned by this court the right is gone, and it certainly ought to go if it be true that we have no power upon an appeal from a conviction of murder in the second degree, or any lesser crime, unanimously affirmed below, to look into the record in order to ascertain whether there was any evidence to submit to the jury.

(7) I will mention only one other case, though this branch of the discussion might be prolonged. By chapter 601 of the Laws of 1895, a defendant who has been convicted as a disorderly person for abandoning his wife is given the right to appeal to this court from the order of commitment, after the affirmance by the Supreme Court; and we have just held that the statute is not violative of any provision of the Constitution. (*People ex rel. v. Cullen*, 153 N. Y. 629.) I am unable to see how we could have sustained that statute except upon the ground that the limitations of section nine were applicable only to civil remedies, since the restriction deprives the legislature of all power to enlarge the right of appeal. Moreover, the right to appeal to this court in so many and such apparently trivial cases, proves that the scheme of limiting appeals did not include criminal cases.

It is obviously impossible at this day, if it ever was possible, to classify appeals in civil and criminal proceedings together, and subject them all alike to the same general and sweeping restriction. The general principles that govern the two branches of the law, the rules of evidence and the methods of procedure are radically different. (*Uncemi v. People* 18 N. Y. 128.) In civil cases issues of fact are determined by a preponderance of testimony, and the law subjects every case and each party to the same general rules. Not so in criminal cases. The accused must be acquitted unless his guilt is established beyond a reasonable doubt. In some cases, as in treason and conspiracy, certain overt acts must be proven and, sometimes, by at least two witnesses. No conviction can be had upon the uncorroborated testimony of an accomplice, and, in at least one class of public offenses, the jury, under the Constitution, must determine both the law and the facts. How can this court ever know whether these rules of law have been observed at the trial if we are concluded upon all the substantial issues in the case by the unanimous opinion of the court below and are forbidden to look into the record to see whether there was any legal evidence upon which to base the judgment? Moreover, the right of appeal in

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criminal cases is not given to both sides as in civil cases, but generally, though not always, to the defendant alone.

The attempt under such conditions to group appeals in civil and criminal cases together in the same class, and to subject them all to the same general and sweeping restrictions, such as are to be found in section nine, is to my mind such a utopian scheme that I am unwilling to believe that any constitutional convention that ever assembled in this state entertained it for a moment. In the criminal law it is a fundamental principle embodied in the Constitution that a person cannot be deprived of life or liberty without proof of the conviction of some crime, and by the common law which the Constitution has adopted, as well as by express statute, unless the proof establishes guilt beyond a reasonable doubt, the accused is entitled to an acquittal as an absolute right. Hence the phrase, "tending to sustain a verdict" has no application. The question is not whether the proof *tends* to sustain the charge as in civil cases, but whether it is established beyond a reasonable doubt. This may be illustrated by the very common case of positive proof by an accomplice that the accused did in fact commit the crime. Certainly here is evidence *tending* to sustain the charge and tending to sustain a verdict not directed by the court. But the law will not permit a conviction to be had on such proof unless corroborated, and yet, according to the contention of the People, if the accused happens to be convicted on such proof, without any corroboration, we have no jurisdiction to look into the record to correct such an error in any case where the court below unanimously affirms the conviction.

If the rule in civil cases applies, it will not help the defendant to show from the record that he has excepted to the submission of the case to the jury. It is, of course, no answer to this argument to say that the defendant should have raised the question in some other way. (*Szuchy v. Hillside Coal & Iron Co.*, 150 N. Y. 219.) The radical vice in the contention, from beginning to end, consists in the effort to apply such a restriction to appeals in criminal cases, by fastening

upon a word or expression in the Constitution, in the nature of an exception, and distorting its meaning.

In a conviction for libel, where the jury determines the law and the facts, can we not look into the record so see whether there was anything tending to sustain the verdict, or is the unanimous affirmance below conclusive? If this restriction is confined to civil cases, where it obviously belongs, these questions cannot possibly arise.

The solution of the question raised in this case seems very plain and simple. We have a statute relating wholly to criminal procedure, enacted since the Constitution went into effect, which, in the plainest terms, gives us jurisdiction over every question of law in the record, and that includes the power to reverse the conviction, if we are satisfied that there was no evidence on any of the material questions of fact to submit to the jury. This statute gives us the same jurisdiction that we had before the present Constitution was enacted. It cannot be shown that this statute is in any way repugnant to the Constitution or to any of its limitations, or that it has in any respect been abridged or modified by that instrument. Every presumption is in favor of its validity. The Constitution and the statute can stand together, and each can perform the office which the lawmakers intended and had in view. No conflict can possibly be created between them unless we push the provisions of the Constitution to a point not warranted by the language. We have only to apply the Code to appeals in criminal cases and the limitations of the Constitution upon appeals to civil cases, and there is no longer any room for conflict.

I regard the question upon which the court has concluded to reverse the judgment as comparatively insignificant. I need not discuss it further than to say that, in my opinion, it is infinitely more difficult to defend the proposition that we have lost jurisdiction over the most substantial questions in the case than it is to uphold the charge of the learned trial judge.

I, therefore, dissent from the judgment in so far as it holds

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that we have no jurisdiction to look into the record to see whether there was any evidence to submit to the jury, and I need not say anything further as to the alleged error in the charge.

BARTLETT, HAIGHT and VANN, JJ., concur with MARTIN, J., for reversal.

GRAY, J., says: I think this judgment should be affirmed. I concur with my brother MARTIN's opinion upon all the points discussed, except as to the alleged error in the charge of the trial judge, and it is from the conclusion which he reaches in that respect that I dissent.

O'BRIEN, J., reads dissenting opinion on question of jurisdiction, but declines to vote on the question of alleged error in the charge.

Judgment reversed and new trial granted.

In the Matter of the Application of DELBERT A. ADAMS, as
 Executor of LYDIA M. WILCOX, Deceased, Respondent, v.
 THE BOARD ON SUPERVISORS OF THE COUNTY OF MONROE,
 Appellant.

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1. TAX — PAYMENT OF ILLEGAL TAX BY EXECUTOR — REFUND UNDER COUNTY LAW. An executor, upon whom an express general power of sale has been conferred by a will devising real estate to the testator's children, to be equally divided among them, with a trust as to the share of one child for maintenance until a certain age, is warranted in paying taxes, illegal because assessed against the "estate" or "heirs" of the decedent, in order to make sale of the land under the power contained in the will, and is entitled to obtain a refund by proceeding under section 16 of the County Law (L. 1892, ch. 686).

2. COUNTY LAW — REFUND OF ILLEGAL TAX. The provision of the County Law (L. 1892, ch. 686, § 16) which confers upon the board of supervisors power to refund to any person the amount of an illegal tax collected from him, and upon the County Court power to direct that it be refunded, was intended for the benefit of a party who pays an illegal tax voluntarily, as well as one who pays under duress. It is a general provision, for the benefit of any one from whom an illegal tax has been collected.

3. MONROE COUNTY — LOCAL STATUTE. A person who has paid an illegal tax upon land in Monroe county is not confined to an application

for relief under the local statute (L. 1884, ch. 107, § 23); and the fact that he has proceeded under that statute and failed to obtain relief, does not preclude him from proceeding for a refund, under the County Law.

4. PROCEEDING UNDER COUNTY LAW. The application of the taxpayer to the board of supervisors and to the county judge, under section 16 of the County Law, for the refund of an illegal tax paid by him, is informal and not governed by any established rules of procedure.

Matter of Adams v. Supervisors, 18 App. Div. 415, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 20, 1897, which reversed an order of the County Court of Monroe county in a special proceeding.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

John Desmond for appellant. In a proceeding of this kind the petitioner must allege and prove affirmatively every fact which entitles him to the relief prayed for. (*Tingue v. Vil. of Port Chester*, 101 N. Y. 294; *Sweeney v. Warren*, 127 N. Y. 426; *Quin v. Skinner*, 49 Barb. 128; *Lovett v. Kingsland*, 44 Barb. 560; 35 N. Y. 617; *Read v. Williams*, 125 N. Y. 560.) The petitioner claimed for the first time in the Appellate Division that he had title as trustee of the share of Charles Wilcox. He should have alleged it in his petition. (*Sweeney v. Warren*, 127 N. Y. 426; *Hetzel v. Barber*, 69 N. Y. 1; *Quin v. Skinner*, 49 Barb. 128; *Lovett v. Gillender*, 35 N. Y. 617; *Girard on Titles* [3d ed.], 454; *Read v. Williams*, 125 N. Y. 560.) Assuming that the omission to allege that the will contained a power in trust which had not been accomplished is not fatal to this proceeding, it is submitted that the trust is not a valid one. (*Hetzel v. Barber*, 69 N. Y. 1; *Chamberlain v. Taylor*, 105 N. Y. 185.) As there was neither a beneficial power nor valid power in trust created by the will, which had not been fulfilled prior to the payment of the taxes, the petitioner not only was under no obligation to pay the taxes in question, but he had no power

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Points of counsel.

to make a conveyance. Therefore, the payment of the taxes in question was not involuntary on his part. (*Van-derbeck v. City of Rochester*, 122 N. Y. 285; *Tripler v. Mayor, etc.*, 125 N. Y. 617; *Bruecher v. Vil. of Port Chester*, 101 N. Y. 240; Code Civ. Pro. § 2719; *In re Selleck*, 111 N. Y. 284.) This proceeding should be dismissed for the reason that the provisions of section 16, County Law, are not applicable to Monroe county. In matters of correcting the assessment rolls, collecting taxes, selling lands for unpaid taxes, the method of procuring deeds and the method of procedure are all provided for by a special act of the legislature, chapter 107, Laws of 1884, amended by chapter 718, Laws of 1893. (*In re Comrs. Central Park*, 50 N. Y. 493; *McKenna v. Edmundstone*, 91 N. Y. 231; *Dudley v. Mayhew*, 3 N. Y. 9; *In re N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 374.) The fatal error of the Appellate Division was in assuming that the petitioner had the same standing in court that an owner of the fee would have had and that he had a valid power. The petitioner had admitted upon the argument in the County Court that he had no power to pay the taxes mentioned in his petition. (*In re Selleck*, 111 N. Y. 284; Code Civ. Pro. § 2719.)

Delbert A. Adams, respondent, in person. The assessments set forth in the petition are clearly illegal and absolutely void upon the face of the roll. (*Trowbridge v. Horan*, 78 N. Y. 439; *Cromwell v. MacLean*, 123 N. Y. 474; *Vil. of Sandy Hill v. Akin*, 77 Hun, 537; *In re Kentworthy*, 17 N. Y. Supp. 655; *People ex rel. v. Valentine*, 5 App. Div. 520; *In re Hartshorn*, 44 N. Y. S. R. 16; *Haight v. Mayor, etc.*, 99 N. Y. 280; *B. & S. L. R. R. Co. v. Suprs. Erie Co.*, 48 N. Y. 93; *Hilton v. Fonda*, 86 N. Y. 339; *Calkins v. Chamberlain*, 15 N. Y. S. R. 576.) The acting executor had the power to sell the farm and to convert the same into money to secure administration of the avails among the parties interested, without the delay and expense of a partition action. (*Kinnier v. Rogers*, 42 N. Y. 531; *Correll v. Lauterbach*, 12 App. Div.

531; *Linão v. Murray*, 91 Hun, 335; *In re Spears*, 89 Hun, 49.) These assessments, tax sales and tax deeds cast a cloud on the title and prevented a sale of the farm by a merchantable title. (*Stewart v. Cryslar*, 100 N. Y. 378; *Smith v. Town*, 47 N. Y. S. R. 665; *Sanders v. Parshall*, 51 N. Y. S. R. 551; 142 N. Y. 679; *Vaughan v. Vil. of Port Chester*, 6 N. Y. S. R. 681; *Culkins v. Chamberlain*, 15 N. Y. S. R. 576; *Pink v. Barberi*, 17 Wkly. Dig. 521; *Strusburgh v. Mayor, etc.*, 87 N. Y. 453; *Travis v. Phelps*, 33 N. Y. Supp. 744; *Lehman v. Roberts*, 86 N. Y. 232; *Boëkes v. Lansing*, 74 N. Y. 437; *Smith v. Reid*, 134 N. Y. 568.) The assessments are void on their face, but the tax deeds are valid until set aside by evidence showing their invalidity in an action. (L. 1884, ch. 107, § 10; *Smith v. Town*, 47 N. Y. S. R. 665.) It was the duty of the county treasurer to cancel the sales when he discovered that the assessments were void. (L. 1884, ch. 107, § 3.) The payment of the taxes was not voluntarily made, but the executor was compelled to pay to sell the farm by a merchantable title. (*Bank of Comm. v. Mayor, etc.*, 43 N. Y. 184; *In re Perry*, 5 Misc. Rep. 149; *Scholey v. Mumford*, 60 N. Y. 498; *Tripler v. Mayor, etc.*, 125 N. Y. 617; 139 N. Y. 1.) The board of supervisors may refund the amount collected of any tax illegally or improperly assessed or levied, and, on the order of the County Court, it shall refund any such tax. (L. 1892, ch. 686, § 16; *In re B. M. G. L. Co.*, 144 N. Y. 228.) Not until an application to the board of supervisors has been made, can the county judge make any order on the subject. (*In re Gilloren*, 16 Misc. Rep. 130.) The question of voluntary or involuntary payment is not presented. Any tax paid upon an illegal assessment must be refunded by the supervisors. (L. 1892, ch. 686, § 16; 144 N. Y. 228; *Tripler v. Mayor, etc.*, 125 N. Y. 617; 139 N. Y. 1.) Our application is made under a special statute, and if we bring ourselves within its provisions, we are entitled to its benefits. (*Vaughan v. Vil. of Port Chester*, 6 N. Y. S. R. 681.) The county treasurer, in our case, applied chapter 107, Laws of 1884, an act to collect unpaid taxes, with full force, sold our farm three times, delivered

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two tax deeds and denied our application to cancel the sales. (*Vaughan v. Vil. of Port Chester*, 6 N. Y. S. R. 681; *Scholey v. Mumford*, 60 N. Y. 498.) The tax title given by the county treasurer was maturing each day against the property and would eventually result in a final order vesting the fee of the land in the purchaser. (L. 1884, ch. 107, § 17; *Kinnier v. Rogers*, 42 N. Y. 531; *Correll v. Lauterbach*, 12 App. Div. 531; *Lindo v. Murray*, 91 Hun, 335; *Smith v. Chase*, 90 Hun, 99; *In re Perry*, 5 Misc. Rep. 149; *Becker v. Becker*, 77 N. Y. S. R. 17.) The title to the share of Charles Wilcox was vested in the executors, as trustees, with power of sale, until Charles Wilcox was twenty-five years of age. (*Benedict v. Arnoux*, 7 App. Div. 1; *Holly v. Hirsch*, 135 N. Y. 590; *Foote v. Bruggerhoff*, 32 N. Y. Supp. 307.) There was no proof that this trust estate had expired or had been in any manner defeated. (*Smith v. F. T. F. Co.*, 17 Misc. Rep. 311; *Foote v. Bruggerhoff*, 32 N. Y. Supp. 397.) The executor does not pay taxes; but when he is the trustee of a share and has a duty to sell real estate and distribute avails it then becomes his duty to pay taxes to preserve the estate. (*In re Selleck*, 111 N. Y. 284; *In re Perry*, 5 Misc. Rep. 149.) It is not necessary that both parties named in the will should join in the petition. (*Moore v. Willett*, 2 Hilt. 522; *Bannon v. McGrane*, 13 J. & S. 517; *Cheney v. Beals*, 47 Barb. 523; *Bright v. Currie*, 5 Sandf. 433; *Thompson v. Whitmarsh*, 100 N. Y. 35; *Buckland v. Gallup*, 105 N. Y. 453.) One executor may remain passive and leave the administration in the hands of his co-executor. (*White v. Bullock*, 20 Barb. 91; Code Civ. Pro. § 1818; *Correll v. Lauterbach*, 12 App. Div. 531.) Payment to an officer who has a valid warrant for the collection of the tax, and who threatens to execute the same, is not a voluntary payment. (*Bruecher v. Vil. of Port Chester*, 101 N. Y. 240; 45 N. Y. 676; 87 N. Y. 452; 83 N. Y. 100; 18 Am. & Eng. Ency. of Law, 218; *Briggs v. Boyd*, 56 N. Y. 289; *Quincey v. White*, 63 N. Y. 370.) The case at bar is a special proceeding commenced by verified petition and order to show cause to enforce

section 16, chapter 686, Laws of 1892, known as the County Law, and decisions of the courts in common-law actions to recover the amount of taxes paid do not apply. (*In re B. M. G. L. Co.*, 144 N. Y. 228; *Etna Ins. Co. v. Mayor, etc.*, 7 App. Div. 145; *Mason v. Prendergast*, 120 N. Y. 536; *Horn v. Town of New Lots*, 83 N. Y. 100; *Bruecher v. Vil. of Port Chester*, 101 N. Y. 240; *Tripler v. Mayor, etc.*, 125 N. Y. 617.)

O'BRIEN, J. The petitioner in the above proceeding is the executor of the will of Lydia M. Wilcox, who died in the year 1890. A part of the property disposed of by the will consisted of a farm of one hundred and thirty-one acres. There was no specific devise of the farm, but the testatrix gave various pecuniary legacies to her children, amounting in the aggregate to about \$12,000. She then devised and bequeathed the residue and remainder of her estate, real and personal, to her eight children by name, to be equally divided between them, but the residuary share of one of them was in trust to the executors until the child arrived at the age of twenty-five years, and the executors were authorized in the meantime to expend such portion of the share for the support and maintenance of the beneficiary as might be necessary. A general power of sale was given to the executors to sell any or all the real estate at discretion. For five years after the death of the testatrix the farm was assessed by the assessors of the town where it was situated to the "Estate of Mrs. L. M. Wilcox," except in the year 1892 it was assessed to "Heirs L. M. Wilcox." In the years 1892, 1893, 1894 and 1895 the farm was sold by the county treasurer for non-payment of general taxes levied by the board of supervisors upon the assessments above described. The land was purchased upon each of these sales by the same persons and at least two conveyances delivered to the purchaser by the treasurer.

In the year 1896 the executor desired to dispose of the farm, and a purchaser was ready to buy it, but on examination of the abstract of title he refused to take it unless the taxes

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were paid and the apparent cloud removed. The executor then, upon notice to the purchaser at the tax sale, applied to the county treasurer under chapter 107, Laws 1884, § 23, to cancel the sales on the ground that the assessments were void and the application was refused. In the year 1896 he presented a petition to the board of supervisors of the county, under chapter 686 of the Laws of 1892, § 16, asking that the taxes and expenses which he was compelled to pay, amounting to \$287.07 with interest, be refunded. This application was refused, although it appeared that the petitioner had paid the taxes in order to make sale of the land under the power contained in the will.

The executor then brought this proceeding by petition to the County Court for an order directing the board of supervisors to refund the amount so paid on account of the taxes referred to. The application was denied, apparently upon the ground that the executor was not obliged to pay the taxes, and hence his action in that respect was voluntary, and that in such cases the party making the payment had no right to have the money refunded. The Appellate Division has reversed the order of the County Court and granted the relief prayed for in the petition. That the assessments were void and the tax sales made under their authority a nullity is not seriously denied by the learned counsel who has argued in support of the appeal.

But by ch. 107, § 10, of the Laws of 1884, which is applicable to the county of Monroe, the deed given at the sales is made conclusive evidence of the regularity of the sale and presumptive evidence of the regularity of the previous proceedings.

This is not a common-law action to recover an illegal tax paid under duress in law or in fact, nor is it an action in equity to remove a cloud upon title. The former action generally requires proof of duress of some kind and in some degree, and the latter is based upon the theory that the incumbrance does not appear upon its face to be void, but requires extraneous evidence to show that it is void in fact. This is a pro-

ceeding under a special statute which confers power upon the supervisors to refund to any person the amount of an illegal tax collected from him, and upon the county judge power to direct that it be refunded in case the board refuse or neglect to perform the duty implied in the statute. (*Matter of Buffalo M. Gas L. Co.*, 144 N. Y. 228.)

There are two questions which have been discussed at considerable length by counsel that do not appear to us to be of much importance in the disposition of this appeal: (1) Whether the payment of the taxes in question by the executor was voluntary or under compulsion or duress. (2) The duty or obligation of the executor to pay the taxes as the representative of the estate or under the power of sale or as trustee under the trust of the share of one of the children.,

Whatever the interest of the executor was in the real estate or whatever the nature of the trust, it is quite clear that he stood in such relation to the property as warranted him in paying the taxes under the circumstances; and, upon any accounting with respect to the proceeds of the sale, he could, we think, properly insist upon being allowed for what he had thus paid.

With respect to the other question, all that the statute requires a party who makes such an application to the supervisors to show is that the county, through its proper officer, had collected from him a tax illegally or improperly assessed or levied. It would not be very difficult to show that the payment in this case was compulsory; but whether it was or not, the executor had the right to have the money refunded, since the statute was intended for the benefit of a party who pays an illegal tax voluntarily, as well as one who pays under what the law terms duress.

This proceeding was not governed by the technical rules that apply to actions at law to recover money voluntarily paid, or to suits in equity to remove a cloud upon title. The statute furnishes a convenient and summary remedy which enables the county to restore, without litigation or expense, what it ought not to retain; and a citizen who has paid an illegal tax,

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without waiting to have his property advertised and sold, to obtain justice.

The benefits of the statute are not confined to parties who have paid an illegal tax upon compulsion, but extend to all persons who have paid taxes that they were not legally bound to pay.

It is said that the petitioner has proceeded under the wrong statute; that he should have procured the sale to be canceled under the local statute (Ch. 107, Laws of 1884), and not have applied under section sixteen of the County Law. The former statute was intended mainly to enable a purchaser who had purchased land upon an illegal sale to withdraw from the transaction and have the purchase price refunded to him after the sale had been canceled. The latter is a general law for the benefit of any one from whom an illegal tax has been collected. There is no conflict between the two statutes. The petitioner did proceed under the local statute and failed to obtain the relief. This did not preclude him from making application to the board of supervisors. The former application was not a bar to the latter. Moreover, it does not appear that any such point was raised or considered below.

The application of the taxpayer to the board of supervisors and the county judge is informal, and not governed by any established rules of procedure.

We think the order appealed from was right and should be affirmed, with costs.

All concur.

Order affirmed.

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158 287

154 628

160 390

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN J. WAKELEY, Commissioner of Highways of the Town of Webb, Appellant, v. ALEXANDER MCINTYRE, Supervisor of the Town of Webb, Respondent.

1. CONSTITUTIONAL LAW — COUNTIES — IMPLIED POWERS OF BOARDS OF SUPERVISORS. Boards of supervisors, in the exercise of the legislative powers conferred upon them by the Constitution, are not confined in their action to the bare letter of the statute enacted to carry out the constitutional provisions, but may, in the exercise of a sound discretion, act under powers that are fairly to be implied.

2. DELEGATED POWERS OF LOCAL LEGISLATION AS TO DETAILS. Within the limits of the power delegated to boards of supervisors by the legislature, under the authority conferred upon it by the Constitution (Art. 3, § 27) to confer, by general laws, upon the boards of supervisors of the several counties of the state "such further powers of local legislation and administration" as the legislature may deem expedient, each board of supervisors is clothed with the sovereignty of the state, and is authorized to legislate as to all details precisely as the legislature might have done in the premises.

3. TOWN HIGHWAY — IMPOSITION OF CONDITIONS UPON CONSTRUCTION. In legislating for a town, under the provisions of the County Law (L. 1892, ch. 686, §§ 69, 70) which empower the board of supervisors of each county to authorize a town to borrow money upon its bonds to build highways and to expend it for that purpose, the board has power to impose conditions as to details, for the interest of the taxpayers, not specified in the statute, such as safeguards to the letting of contracts, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer, to be paid out only upon the certificate of the engineer; and such conditions, so imposed, are binding upon the town commissioners of highways.

People ex rel. Wakeley v. McIntyre, 21 App. Div. 633, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 22, 1897, affirming an order of the Special Term, denying relator's application, as commissioner of highways of the town of Webb, Herkimer county, for a peremptory writ of mandamus compelling the supervisor of the town to issue certain bonds.

The facts, so far as material, are stated in the opinion.

C. D. Adams for appellant. The portion of the act of the supervisors relied on by the respondent is void, and must be disregarded and stricken out. (62 N. Y. 484; 106 N. Y. 392; 50 Barb. 573; 35 Barb. 408; L. 1892, ch. 686, §§ 13-15, 17, 69; 125 N. Y. 88; 96 N. Y. 294.) The contracts are valid and bind the town. (Town Law, §§ 2, 182; 1 Barb. 584; 33 N. Y. 282; 27 N. Y. 378; 1 Dillon on Mun. Corp. § 449; Boone on Corp. § 289.) This supervisor should be compelled to do his duty by mandamus. (64 N. Y. 53; L. 1869, ch. 856; L. 1874, ch. 260; L. 1892, ch. 686, §§ 69, 70; 96 N. Y. 587; 96 N. Y. 567.) Relator is entitled to the writ. (149 N. Y. 414.) Respondent showed no valid excuse, affirmatively or by way of avoidance, for refusing to perform his official duty. (77 N. Y. 503, 511; 12 Abb. [N. S.] 47; 16 Misc. Rep. 306; 136 N. Y. 343; 73 N. Y. 443; 76 N. Y. 475; 5 Abb. [N. C.] 383; 85 N. Y. 545; 96 N. Y. 567; 63 N. Y. 348.) This is not a case of discretion, but of legal error, and is reviewable on this appeal. (78 N. Y. 68; 2 Johns. Cas. 215; 53 N. Y. 322; 78 N. Y. 56, 61; 104 N. Y. 96; 107 N. Y. 325; *People ex rel. v. Kelly*, 76 N. Y. 475; 154 N. Y. 14.) Under section 2070 of the Code of Civil Procedure this motion should have been granted, denied or the alternative writ ordered. (Code Civ. Pro. § 1015; 136 N. Y. 505; 68 Hun, 549.) The Appellate Division has awarded costs in this proceeding, as if it were an appeal from a judgment, instead of an appeal from an order. This is erroneous. (Code Civ. Pro. §§ 2070, 2086, 3240, 3251, 3258; 78 N. Y. 541; *Loomer v. Vil. of Dolgeville*, 3 App. Div. 618; 74 Hun, 179; 90 Hun, 253.)

Charles E. Snyder for respondent. Mandamus is a discretionary writ. (14 Am. & Eng. Ency. of Law, 97; *People ex rel. v. Suprs. of Westchester Co.*, 15 Barb. 607; *People ex rel. v. Croton Aqueduct Board*, 49 Barb. 259; *People ex rel. v. Ferris*, 76 N. Y. 326; *People ex rel. v. Newton*, 126 N. Y. 656; *People ex rel. v. Common Council of Syracuse*, 78 N. Y. 56; *People ex rel. v. Chapin*, 104 N. Y. 96; Merrill on Man-

damus, §§ 62, 68, 71, 72; *People ex rel. v. Mayor, etc.*, 149 N. Y. 215; *People ex rel. v. Bd. of Canvassers*, 129 N. Y. 360.) The board of supervisors of Herkimer county have authority to legislate concerning this highway. (Const. N. Y. art. 3, § 27; *People ex rel. v. Bd. Suprs. Queens Co.*, 112 N. Y. 585; *Rathbone v. Wirth*, 150 N. Y. 459; L. 1892, ch. 686, §§ 69, 70.) Assuming the conditions attached to the authorization by the board of supervisors of Herkimer county as claimed by the relator to be illegal, he is not entitled to a mandamus. (*Rathbone v. Wirth*, 150 N. Y. 477; Cooley on Const. Lim. 178; *People ex rel. v. Kenney*, 96 N. Y. 294; 18 Hun, 116; *Falconer v. B. & J. R. R. Co.*, 69 N. Y. 491.) The conditions attached to the authorization by the board of supervisors of Herkimer county are legal and valid. (*Smith v. Levinus*, 8 N. Y. 472; *Rogers v. Jones*, 1 Wend. 237; *State v. Welch*, 36 Conn. 215; *Roberts v. Bd. of Suprs. Kings Co.*, 3 App. Div. 366; *Matter of Church*, 92 N. Y. 1; *Hubbard v. Sadler*, 104 N. Y. 223; Dillon on Mun. Corp. § 309; L. 1892, ch. 686, §§ 69, 70; L. 1875, ch. 482; Const. N. Y. art. 7, § 9.)

BARTLETT, J. The authorities of the town of Webb, Herkimer county, about December, 1896, laid out a highway from Eagle bay, on Fourth lake, down the north side of the Fulton chain of lakes to Old Forge or some other point. Thereupon a petition was presented to the board of supervisors of Herkimer county to authorize the town to proceed with this work, which was accompanied by a proposed form of act.

The board referred the matter to the judiciary committee, who reported that it was inexpedient to pass the proposed act in the form submitted.

An act was passed later containing certain conditions calculated to protect the town in the prosecution of the work, which were substantially as follows: That no bonds were to be sold until after the contract or contracts for building the road should have been entered into so as to determine the amount necessary to be raised; that public notice for the sub-

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

mission of bids should be published and the contract awarded to the lowest responsible bidder furnishing security; that the work was to be prosecuted under the supervision of a civil engineer named and all moneys paid out upon his certificate; that the moneys realized upon the bonds were to be deposited with the treasurer of Herkimer county and be paid to the contractor by a draft of the commissioner of highways, accompanied by a certificate of the engineer.

Thereafter the relator advertised for bids, received a number varying in price per mile for the work to be performed, and, after consideration, rejected them all.

Subsequently he entered into contracts with two firms of contractors at a price per mile considerably in excess of the lowest bid so rejected.

The relator now seeks to compel the supervisor of the town to issue bonds and raise money by sale of the same to pay for the prosecution of the work in building this road.

The application is resisted on the ground that the relator's relations with the contractors, and his conduct generally in the premises, warranted the court, in the exercise of a sound discretion, refusing the writ, and, further, that there had been no compliance by the relator with the conditions contained in the act of the board of supervisors authorizing the construction of the road.

The Special Term denied the writ, with leave to the relator within ten days to go to a reference and take proof as to all the matters and things alleged in the opposing affidavits, the referee to report the testimony to the court, with his opinion upon all the questions of fact and of law.

The relator failed to avail himself of this privilege, and appealed to the Appellate Division, where the order of the Special Term was affirmed, without opinion.

The affidavits submitted in opposition to the issuing of the writ contain an attack upon the good faith and character of the relator, but we do not deem it necessary to pass upon these questions of fact.

The principal point upon which this appeal turns is whether

the board of supervisors, in the exercise of those legislative powers conferred upon it by the Constitution, is confined in its action to the bare letter of the statute enacted to carry out the constitutional provision, or may it, in the exercise of a sound discretion, act under powers that are fairly to be implied?

The County Law (Laws of 1892, ch. 686) provides (§§ 69 and 70) that the board may authorize a town to borrow money upon its bonds to build highways and to expend it for that purpose.

The position of the relator is that, as the County Law does not confer in express terms the power upon the board of supervisors to enact the conditions found in the act under consideration, such provisions are necessarily void, and the act must be considered as valid only with the objectionable clauses stricken out.

The Constitution provides (Art. 3, § 27) that the legislature shall by general laws confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the legislature may from time to time deem expedient.

Within the limits of this delegated power, the board of supervisors is clothed with the sovereignty of the state, and is authorized to legislate as to all details precisely as the legislature might have done in the premises.

The evident intent of the framers of the Constitution in permitting the legislature to delegate certain of its powers to the local boards was to carry out a public policy which assumes that the interests of a particular locality are best subserved by those who are familiar with its affairs.

It would be quite impossible for a board of supervisors to properly legislate in regard to local affairs, if it were not at liberty to resort to those implied powers, within the limits of its jurisdiction, vested in the legislature of the state.

The various conditions imposed upon the construction of this particular road were in the interests of the taxpayers and clearly within the power of the board to enact.

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It was most judicious to throw about the letting of the contracts certain safeguards and to provide that the work was to be prosecuted under competent supervision and the money realized upon the sale of the bonds deposited with the fiscal officer of the county to be paid out only upon the certificate of the engineer.

It appears by this record that the relator refused to be bound by some of these conditions in the act, being of the opinion that they were void and did not bind him.

It follows that the court below properly denied the peremptory writ on this ground alone.

We do not wish to be understood, in declining to examine the questions of fact presented by the papers bearing on relator's character, as expressing an opinion one way or the other.

It must be conceded that if the allegations of the opposing affidavits were found to be true the court was justified in the exercise of a sound discretion in refusing the writ, but it has seemed to us that in justice to the relator the decision of this appeal should rest on the ground already stated, rather than to try an important question of fact upon affidavits containing some allegations purely hearsay in character.

It follows that the court below properly denied the peremptory writ.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

154	684
s 155	668

154	684
160	500

154	684
j 165	480

In the Matter of the Estate of JOSEPH WARREN TOMPKINS,
Deceased.

DAVID VERPLANCK, as Executor and Trustee of JOSEPH WARREN TOMPKINS, Deceased, Appellant, v. JOTHAM S. TOMPKINS, Appellant, and STEPHANIE MOREL, as Executrix of EMIL B. MOREL, Deceased, Respondent.

JOTHAM S. TOMPKINS, Appellant, v. DAVID VERPLANCK, as Executor and Trustee of JOSEPH WARREN TOMPKINS, Deceased, Appellant, and STEPHANIE MOREL, as Executrix of EMIL B. MOREL, Deceased, Respondent.

1. WILL—TRUST TO EXECUTORS. A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them.

2. TRUST FOR LIVES—VESTING OF REMAINDER. A trust limited to lives offers no greater obstacle to the present vesting of the remainder in fee or residue of personalty than does a life estate.

3. ALIENABLE ESTATE. The grantee of lands devised subject to the execution of a trust has a legal estate against all persons except the trustee (1 R. S. 729, §§ 60, 61); and such an estate is alienable, subject to the execution of the trust.

4. CANONS OF CONSTRUCTION. The canons of construction, that effect must be given, if possible, to every part of the will, and that the testator intended to dispose of his entire estate, applied.

5. EVENTUAL ESTATE. The rule, that rents and profits undisposed of during a valid limitation of an expectant estate shall belong to the persons presumptively entitled to the next eventual estate (1 R. S. 726, § 40), applied.

6. WILL CONSTRUED—VESTED REMAINDER, SUBJECT TO EXECUTION OF TRUST FOR LIVES—TENANCY IN COMMON OF INCOME—PASSAGE OF UNDISPOSED-OF INCOME TO PERSON PRESUMPTIVELY ENTITLED TO EVENTUAL ESTATE. The 4th and 5th clauses of the will of a testator who left a wife, a son and a daughter, directed the executors to sell certain real and personal property and to invest and dispose of the net proceeds "as hereinafter directed as to the residue of my estate or the proceeds thereof." The 6th clause devised to the executors a house and lot, which constituted all the property not dealt with in prior parts of the will, with power to receive the rents during the lives of the wife and son, or that of the longest liver of them, upon the trust to pay the same, during that period, in equal shares to the wife, son and daughter, or the "lawful issue or descendants" of the son or daughter, if either should die before the wife, "such descendant receiving the share of their parent," and directed the executors, at the decease of the wife and son, to "deliver up

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to my said children or their descendants the said house and lot, which is then to belong to them in fee." This clause then gave the executors a power to sell, under direction of the court, at any time during the lives of the son and wife or the longest liver of them, directed the proceeds to be invested by the executors and the income paid in equal shares to the wife, son and daughter, and provided that, at the death of the longest liver of the wife and son, the principal should be equally divided between the son and daughter "or their lawful descendants." The 8th clause directed that all moneys arising from sales of real and personal property, ordered to be sold and not otherwise disposed of, should be invested by the executors during the lives of the wife and son, or the longest liver of them, and the interest divided equally between the wife, son and daughter. The property was sold as authorized. The testator's wife died before the daughter, who, dying unmarried and without issue, devised and bequeathed any interest she had in her father's estate to one E. B. M. The latter subsequently died, leaving all his property to S. M. The testator's son, at the time of construing the will, was seventy-three years old and without issue. *Held*, that the words, "or their lawful descendants," in the 8th clause, referred to a death of the son or daughter in the lifetime of the testator; that that clause created a valid trust in the proceeds of the sale of the house and lot, terminable on the death of the son; that, as to the income, the beneficiaries took as tenants in common; that at the testator's death the remainders vested in his son and daughter absolutely, subject to the execution of the trust; that the proceeds of sale of property covered by the 4th and 5th clauses were disposed of by force of the provision therein that they should be disposed of as "hereinafter directed as to the residue of my estate or the proceeds thereof," and the disposition of the residue by the 6th and 8th clauses; that all the residuary interest which the daughter had in the principal of her father's estate, at the time of her decease, passed under her will to E. B. M., and, under the latter's will, to S. M.; that as the daughter took her interest in the income as tenant in common, that interest after her death was undisposed of by her father's will and did not go to the survivor, but passed, by the statute (1 R. S. 726, § 40), to the person "presumptively entitled to the next eventual estate," that is, to E. B. M., the daughter's devisee, and, on his death, to S. M., his devisee; that the trust will continue until the death of the testator's son, and during that time the income of the trust estate, including that of the principal under the 8th clause, must be paid, one-half each, to S. M. and the son; that at the death of the son the trust ends and the *corpus* of the estate must be divided, one half to S. M., or to her representatives or assigns, and the other half to the representatives or assigns of the son; and that E. B. M. was entitled, under the statute, to one-half the income of the estate from the death of the testator's daughter until his decease.

Tompkins v. Verplanck, 10 App. Div. 572, modified.

(Argued December 7, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1896, affirming an order of the surrogate of Westchester county.

Also an appeal from a judgment of the Appellate Division in the second department, entered December 26, 1896, reversing a judgment of the Special Term, Westchester county, in the action of David Verplanck, as executor and trustee, against Jotham S. Tompkins et al., for an accounting.

Also in an action of Jotham S. Tompkins against David Verplanck, as executor and trustee, for a construction of the will of Joseph Warren Tompkins.

The above two actions were consolidated and tried together.

The surrogate's proceedings and the consolidated actions involve the construction of the said will.

The provisions of the will necessary to be examined are the fourth, fifth, sixth and eighth clauses, which are as follows:

"*Fourth.* All my mills, factories, water power rights of pondage and everything appertaining thereto, situate at Kensico, in the town of North Castle, in the said county, or elsewhere in that town which I may own at my decease, I give and devise to my executors hereinafter named, with power to take possession of, occupy, rent out and keep in repair and receive the rents and profits thereof until the same shall be sold and conveyed by my executors as hereinafter directed, and I do direct my said executors as soon as they can obtain a fair price therefor, to sell and convey the same in fee simple absolute at public or private sale in their discretion in one or more parcels as they may judge most beneficial to my estate, and out of the moneys arising from the sale thereof, to pay and discharge all liens and incumbrances thereon and all other liens and incumbrances on all or any real estate owned by me at my decease, together with all just debts owing by me at my decease; the residue of said sales I direct my executors to invest upon interest and dispose of as hereinafter directed as to the residue of my estate or the proceeds thereof.

"*Fifth.* My dwelling house and about seven acres of land

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in the village of White Plains with all the chattels and movable property thereon, and all other lands, tenements or real estate owned by me at my decease, except so much thereof as is in this, my will, otherwise disposed of, I give and devise to my executors hereinafter named, with power to take possession of, rent out, keep in repair, receive the rents and profits thereof, until the same shall be sold and conveyed by my executors as hereinafter directed. I do hereby direct my said executors, as soon as they can obtain a fair price for the same, to sell and convey the same at public or private sale in their discretion, and the moneys arising from the sale thereof I order my executors to invest upon interest and dispose of as hereinafter directed as to the residue of my estate or the proceeds thereof.

"*Sixth.* My house and lot in the city of New York, known as No. 15 Wall street, I give and devise to my said executors with everything appertaining thereto, with power to take possession of, occupy, rent out and keep in repair and receive the rents, issues and profits thereof as if they were owners thereof, during the lives of my wife, Sarah Walton, and my son, Jotham, but upon the express trusts and condition that during the said lives or that of the longest liver of them my said executors, as often as received, pay and distribute in equal parts, the net rents of said house and lot to my said wife, Sarah Walton, my daughter, Marion, and my son, Jotham, or the lawful issue or descendants of my said son or my said daughter, if either should die before my said wife, such descendant receiving the share of their parent, and at the decease of my said wife and son, Jotham, to deliver up to my said two children or their descendants the said house and lot which is then to belong to them in fee, but inasmuch as by fire, accident or change in the city of New York, it may be expedient and necessary or greatly to the interest of my estate during the lives of my said son and wife or longest liver of them to sell and convey said house and lot No. 15 Wall street in fee, in that event, I authorize my said executors to apply to the Supreme Court and upon proof to said court of the pro-

priety and necessity of said sale to its satisfaction, I authorize said court to direct a sale thereof by my said executors in fee, and the moneys arising from the sale thereof to be invested upon interest by my said executors until the death of my said wife and son or the longest liver of them and the interest and income thereof paid in equal shares to my said wife and son and daughter as aforesaid, and at the death of the longest liver of my said wife and son, the principal to be equally divided between my said son and daughter or their lawful descendants.

“*Eighth.* All the moneys arising from the sales of my said real and personal property in this, my will, ordered to be sold and not in this, my will, otherwise disposed of, after payment of all my just debts and liens on my said real estate and the legacy aforesaid, I order my executors to invest and keep invested on interest, on bond and mortgage, on real estate in the state of New York, in the stocks or bonds of the state of New York or of the United States, at the best interest they can obtain for the same during the life of my said wife and son or the longest liver of them, and as often as received to pay and divide equally the said interest between my said wife and son and daughter.”

Abel Crook for David Verplanck, executor, appellant. The devise to the executor created a valid express trust whereby the executor took by implication as well as by direct devise the entire estate during the lives of the widow and Jotham, subject only to the execution of the trust. (*Nicoll v. Walworth*, 4 Den. 385; *Brewster v. Striker*, 2 N. Y. 19; *Knox v. Jones*, 47 N. Y. 389; *Amory v. Lord*, 9 N. Y. 403; *Boyn-ton v. Hoyt*, 1 Den. 53; *Garvey v. McDevitt*, 72 N. Y. 556; *Tucker v. Tucker*, 5 N. Y. 408; *Savage v. Burnham*, 17 N. Y. 569; *Radley v. Kuhn*, 97 N. Y. 32.) Because of the interposition of the trust estate no portion of the estate vested in the children of the testator, or could vest in them, until the termination of the trust estate—that is, until the

death of Jotham, the longest liver of the selected two lives. (1 Preston on Estates, 65; *Hayes v. Good*, 7 Leigh [Va], 496; *Tayloe v. Gould*, 10 Barb. 396; *Griffin v. Shepard*, 124 N. Y. 70.) The word "descendants," used by the testator in his will, is synonymous with "issue of the body," and does not include collateral relatives. Hence, neither Marion nor Jotham could take from the other under such description. (*Hamlin v. Osgood*, 1 Redf. 409; *Armstrong v. Moran*, 1 Bradf. 314; *Van Beuren v. Dash*, 30 N. Y. 393.) There is no legal presumption that Jotham will not leave descendants surviving him. He may marry and raise a family. (*Appar's Case*, 37 N. J. Eq. 501; *List v. Rodney*, 83 Penn. St. 483.) The trust being valid as an express trust under our statutes, limited by the two lives in being at testator's death, the application or payment of a share in the rents and income must terminate as to each of the three *cestuis que trust* on their respective deaths. (*Downing v. Marshall*, 23 N. Y. 377; *Monarque v. Monarque*, 80 N. Y. 320; *Crooke v. County of Kings*, 97 N. Y. 421; 3 R. S. 3176-3180; 2 R. S. 2193.) The intention of the testator, when ascertained from the will itself, will govern in the construction of wills. (*Shipman v. Rollins*, 98 N. Y. 311; *Smith v. Edwards*, 88 N. Y. 105; *Delafield v. Shipman*, 103 N. Y. 463; *Byrnes v. Stilwell*, 103 N. Y. 458; *Scott v. Guernsey*, 48 N. Y. 106; *Stevenson v. Lesley*, 70 N. Y. 512; *Matter of Baer*, 147 N. Y. 348; *Matter of Merriman*, 91 Hun, 120; *Shangle v. Hallock*, 6 App. Div. 55.)

William L. Snyder for Jotham S. Tompkins, appellant. Marion W. Tompkins having died unmarried and without issue, leaving her brother Jotham surviving, acquired no property or interest in her father's estate which she could dispose of by a last will and testament. (1 R. S. 728, 730, §§ 55, 65; *Garvey v. McDevitt*, 72 N. Y. 556; *Tobias v. Ketchum*, 32 N. Y. 326; *Tucker v. Tucker*, 5 N. Y. 408; *Radley v. Kuhn*, 97 N. Y. 32.) The Appellate Division erred in holding that

the testator died intestate as to the remainder after the termination of the trust estate. (1 R. S. 725, § 28.)

F. J. Worcester for Stephanie Morel, respondent. Marion W. Tompkins took a vested alienable interest in the real estate devised by the 6th paragraph of the will, subject to the trust therein created. (*Manice v. Manice*, 43 N. Y. 303; *Embury v. Sheldon*, 68 N. Y. 227; *Moore v. Lyon*, 25 Wend. 144; *Nelson v. Russell*, 135 N. Y. 137; *Matter of Seebeck*, 140 N. Y. 241; *Livingston v. Greene*, 52 N. Y. 118; *Goebel v. Wolf*, 113 N. Y. 405; *Mitchell v. Knapp*, 54 Hun, 500; *Matter of Tienken*, 131 N. Y. 391; *Delafield v. Shipman*, 103 N. Y. 463; *Matter of Kimberly*, 150 N. Y. 90.) If both Marion and Jotham took, under the will, only such interests in the property as would necessarily cease at their death, then it is submitted that they would each have, notwithstanding the will, the same interest which we have claimed was given to them by the will. (1 R. S. 729, § 62; *Van Nostrand v. Marvin*, 16 App. Div. 28; *Howland v. Clendenin*, 134 N. Y. 305.) The petitioner in the Surrogate's Court, Mrs. Morel, is also entitled to the income of Marion's share. (1 R. S. 726, § 40.)

V. Wright Kingsley also for Stephanie Morel, respondent. Stephanie Morel, through the will of Emil B. Morel, acquired all the residuary interest Marion Tompkins had in the principal of her father's estate at the time of Marion's decease, and she is entitled to half of the income of the trust estate until the death of Jotham Tompkins. Upon his death she is entitled to one-half of the *corpus* of the estate; she is also entitled to one-half the income since the decree entered before the surrogate in January, 1890. (1 R. S. 723, 724, 727, §§ 12, 13, 22, 44; *Kenyon v. See*, 94 N. Y. 563; *Tompkins v. Verplanck*, 10 App. Div. 572; *Freeborn v. Wagner*, 2 Abb. Pr. 182; *Miller v. Emans*, 19 N. Y. 387; *Matter of Moore*, 8 N. Y. S. R. 602; *Gurnsy v. Gurnsy*, 36 N. Y. 267; *Manice v. Manice*, 43 N. Y. 303; *Embury*

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v. *Sheldon*, 68 N. Y. 227; *Everitt v. Everitt*, 29 N. Y. 39; *Wells v. Wells*, 84 N. Y. 325; *Moore v. Lyons*, 25 Wend. 119.)

BARTLETT, J. We are called upon to construe the will of Joseph Warren Tompkins, deceased, at one time a well-known lawyer in Westchester county.

The testator left him surviving a widow and two children, a son, Jotham S. Tompkins, and a daughter, Marion W. Tompkins.

The testator died in 1874, the widow in 1885 and the daughter in 1889 unmarried and without issue. The son, Jotham, still survives, a widower without issue, aged seventy-three years.

The daughter, Marion, left a will by which she devised and bequeathed to one Emil B. Morel any interest she had in the estate of her father.

Morel died subsequently, leaving all his property to Stephanie Morel, his wife, who is a party to this action as executrix of her husband's will, and claims to represent the rights of Marion.

The principal point in this case is the construction to be given the sixth clause of the will, which reads in part as follows:

"*Sixth.* My house and lot in the city of New York, known as No. 15 Wall street, I give and devise to my said executors with everything appertaining thereto, with power to take possession of, occupy, rent out and keep in repair and receive the rents, issues and profits thereof as if they were owners thereof, during the lives of my wife, Sarah Walton, and my son, Jotham, but upon the express trusts and condition that during the said lives or that of the longest liver of them my said executors, as often as received, pay and distribute in equal parts the net rents of said house and lot to my said wife, Sarah Walton, my daughter, Marion, and my son, Jotham, or the lawful issue or descendants of my said son or my said daughter,

if either should die before my said wife, such descendant receiving the share of their parent; and at the decease of my said wife and son, Jotham, to deliver up to my said two children or their descendants the said house and lot which is then to belong to them in fee."

Then follows an authorization to sell the premises No. 15 Wall street, with the permission of the court, and a direction to deal with the proceeds substantially as provided for the real estate and its rents and profits.

This property was sold as authorized.

It is the contention of counsel for executor that this clause of the will creates a valid express trust, whereby the executor took by implication, as well as by direct devise, the entire estate during the lives of the widow and Jotham, both in law and equity, subject only to the execution of the trust.

Further, that because of the interposition of the trust estate no portion of the estate vested in the children of the testator, or could vest in them until the termination of the trust estate, that is, until the death of Jotham, the longest liver of the two selected lives; that the death of the daughter Marion has defeated her estate, and that Jotham's estate must necessarily terminate with the trust, because his life is the ultimate one selected upon which its duration depends; that the word "descendants," used by the testator in the will, is synonymous with "issue of the body," and does not include collateral relatives, hence, neither Marion nor Jotham could take from the other.

In the proceedings in Surrogate's Court, instituted to compel David Verplanck as executor and trustee to pay over to petitioner, Stephanie Morel, one-half of the income of certain trust funds created by the will, it is stated in the opinion that Marion took a vested alienable interest in the real estate devised by the sixth clause of the will, subject to the trust therein created; that the rents mentioned in the sixth clause, to which Marion would have been entitled if living, are undisposed of by the will, and they, therefore, belong, under the Revised Statutes (1 R. S. 726, § 40), to the person presumptively enti-

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tled to the next eventual estate, and the petitioner, Stephanie Morel, is such person ; that as to the residue of the real estate disposed of by the eighth clause of the will testator died intestate, and, this being so, it vested in Jotham and Marion immediately upon their father's death, subject to the execution of the trust, Marion's interest passing under her will.

The Special Term held that the trustees were vested with the entire legal title of the *corpus* of the estate until the death of Jotham ; that no portion of the principal ever vested in Marion or passed under her will ; that the entire income since Marion's death belonged to Jotham ; that no portion of the principal ever vested or can vest in Jotham, and, at his death, the *corpus* of the estate will vest in the persons, if any, who will then answer the description of his descendants.

The Appellate Division affirmed the decree of the Surrogate's Court and reversed that of the Special Term.

We agree with the learned Appellate Division that the will created a valid trust and that, as to the income, the beneficiaries take as tenants in common and not as joint tenants.

As to the remainders, on the termination of the trust, the opinion of the Appellate Division, after dealing with the difficulties of treating them as contingent, goes on to state : " But, if the remainders were to be vested subject only to be divested in favor of descendants, in case the devisee should leave descendants, then the testamentary direction is wholly reasonable and natural. We are of opinion that the latter construction must, therefore, prevail." The opinion then states that it would be unwise to decide what effect possible issue of Jotham would have on the vested estates.

We are of opinion that a fundamental error has entered into the construction of this will as to the effect to be given the words of gift in the sixth clause, to the son or daughter or their " lawful descendants."

While these words were treated by the Appellate Division as a gift by substitution in case of the death of the first legatee or devisee, they were held to refer to a death during the continuation of the trust.

We think these words refer to a death in the lifetime of the testator, and such a construction removes many of the difficulties in carrying out the obvious intention of the testator.

At the testator's death the remainders vested in Marion and Jotham absolutely, subject to the execution of the trust. (*Livingston v. Greene*, 52 N. Y. 119; *Embury v. Sheldon*, 68 N. Y. 227; *Nelson v. Russell*, 135 N. Y. 137; *Stokes v. Weston*, 142 N. Y. 433.)

A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. (*Everitt v. Everitt*, 29 N. Y. 39; *Manice v. Manice*, 43 N. Y. 303.) In the case at bar the trustees took only such an estate as was commensurate with their trust duties, and those were limited solely to lives. It is clear they never took the remainder in fee, or the residue of personalty after the end of the trust estate. A trust limited to lives offers no greater obstacle to the present vesting of the remainder in fee or residue of personalty than does a life estate.

The trustee takes an estate in possession and such title as will enable him to execute his trust.

The learned counsel for the executor argues that, by reason of the interposition of the trust estate, no portion of the estate vested in the children of the testator until the termination of the trust; that there can be no vested estate without a present legal and existing right of alienation, which cannot be until the termination of the precedent estate.

If such were the effect of an express trust created by will, it would prove a serious obstacle to carrying out the intention of testators.

The Statute of Uses and Trusts provides that, while an express trust vests the whole estate in the trustee in law and in equity, it shall not prevent any person creating a trust from granting or devising such lands, subject to the execution of the trust, and such grantee has a legal estate against all persons except the trustee. (1 R. S. 729, §§ 60, 61.)

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Such an estate is alienable, subject to the execution of the trust. (*Briggs v. Davis*, 21 N. Y. 576, 577; *McLean v. Freeman*, 70 N. Y. 85.)

Starting out with a vesting of the residuary estates at testator's death and adopting the familiar canon of construction, that effect must be given if possible to every part of the will (*Wright v. Denn*, 10 Wheat. 239; *Daves v. Swan*, 4 Mass. 208), and that the testator intended to dispose of his entire estate, there is no great difficulty in harmonizing the various provisions of the instrument and preventing intestacy either as to principal or income.

The scheme of the will is simple, and while in some respects it might have been more clearly expressed, yet the general intention of the testator is manifest.

The fourth and fifth clauses direct the executors to sell certain real and personal property, and out of the proceeds pay the liens thereon, the debts of the testator, and to invest the residue and dispose of it in the same manner as the residue of the estate.

The eighth clause provides that all the moneys arising from the sales of real and personal property, and not in the will otherwise disposed of, are to be invested, and the income thereof paid to the widow, son and daughter during the lives of the widow and son and the survivor of them.

It thus appears that the testator, after providing for certain specific legacies, directed the sale of the balance of his estate, real and personal, except his property in the city of New York, and directed the investment of the residue of the proceeds and the payment of the income during the lives of his widow and son to them and his daughter.

The principal arising from the sales with the interest the testator had thus disposed of in the fourth and fifth clauses, in the same manner as the residue of his estate.

The court below, in its opinion, suggests that "the will contains no residuary clause, and makes no further final disposition of the testator's estate other than that prescribed in the sixth and eighth clauses."

The sixth clause deals with the residue of the estate, as all property, real and personal, save that located in the city of New York, is disposed of by the other portions of the will.

The sixth clause, as already pointed out, creates a valid trust in the proceeds of the sale of the New York city property, and the income is disposed of during lives, and the principal divided, on the termination of the trust, between the son and daughter.

The testator, by the fourth and fifth clauses, provides that the net proceeds of the sales under those clauses shall be disposed of "as hereinafter directed as to the residue of my estate." It is thus clear that this principal, invested under the eighth clause, is to be divided between the son and daughter when the trust under the sixth clause terminates, as this investment is limited by the same lives as those upon which the trust rests.

There is no intestacy as to the principal or residue under the eighth clause.

When we read together the portions of the will *in pari materia*, we find that the testator has disposed of his entire estate. (*Allen v. Allen*, 149 N. Y. 280-285.)

It follows that all the residuary interest Marion had in the principal of her father's estate, at the time of her decease, passed under her will to Emil B. Morel, and by the will of the latter to his widow, Stephanie Morel.

The interest of Marion in the income of the estate, after her death, was undisposed of by her father's will, as she took as tenant in common, and consequently her share of the income did not go to the survivors. This being the situation, her share goes by statute to the person presumptively entitled to the next eventual estate. (1 R. S. 726, § 40; *Embury v. Sheldon*, 68 N. Y. 227; *Delafield v. Shipman*, 103 N. Y. 463.)

As already pointed out, Marion's interest in the principal of her father's estate passed under her will to Emil B. Morel, and from him to his executrix and devisee, Stephanie Morel.

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Morel and his widow were thus successively the person entitled to the next eventual estate.

The trust will continue until the death of Jotham, the son, and during that time the income of the trust estate, including that of the principal under the eighth clause of the will, must be paid, one-half each, to Stephanie Morel, as executrix, legatee and devisee under her husband's will, and to Jotham S. Tompkins.

At the death of Jotham the trust ends, and the *corpus* of the estate must be divided, one-half to Stephanie Morel, as executrix, legatee and devisee under her husband's will, or to her successors, heirs, legal representatives or assigns, and the other half to the heirs, devisees, legatees, legal representatives or assigns of Jotham S. Tompkins.

Emil B. Morel was entitled under the statute to one-half the income of the estate from the death of Marion in 1889 until his decease in 1894.

The accounts in the Surrogate's Court should be adjusted on this basis, as Mr. Morel, by his answers in the Supreme Court actions, made a claim to the principal and income.

Stephanie Morel, as executrix, devisee and legatee under her husband's will, is entitled to one-half the income of the estate from and after the death of Emil B. Morel.

The judgment of the Appellate Division should be modified so as to conform to this decision, and as so modified affirmed, with costs in this court to all parties who were allowed costs in the Appellate Division, to be paid out of the principal fund of the estate.

All concur.

Judgment accordingly.

154	648
155	866
154	648
163	96
154	648
170	4 5

154	648
75	AD*592

154	648
173	*502

JOSHUA L. BAILY et al. and JAMES TALCOTT, Respondents, v.
LEWIS M. HORNTAL, Appellant, Impleaded with ALBERT
WEIS and ROBERT WEIS.

1. PARTNERSHIP — WITHDRAWAL OF CAPITAL. The doctrine that a partner who retires from an insolvent firm and withdraws from it a sum of money as his share of the contributed capital is defrauding the creditors of the firm, applies with the same force to a limited as to a general partnership.

2. INSOLVENT LIMITED PARTNERSHIP — RETURN OF CAPITAL TO SPECIAL PARTNER. If a limited partnership was insolvent at its termination, and a succeeding general partnership and the general partners have been since continually insolvent, a special partner cannot retain the capital that he had contributed to the firm, when voluntarily paid back to him by the general partners after they had become insolvent, as against judgment creditors of the general partners whose claims were in existence when the payment was made, at least in the absence of an agreement made in good faith, in ignorance of the fact of insolvency and without knowledge of such facts as would put a prudent man upon inquiry.

3. CREDITORS' ACTION. An action in equity lies at the suit of judgment creditors, with executions returned unsatisfied, of the general partners in a terminated insolvent limited partnership, organized under the laws of Texas, and in a succeeding general partnership, to reach a specific fund in the hands of a special partner, upon the theory that he had no right to the same, as against the creditors of the judgment debtors, because he received it, under the designation of returned capital, from the debtors virtually as a gift when they were insolvent.

4. EVIDENCE OF INSOLVENCY. The evidence examined and held to support the conclusion of the courts below (the facts having been found by the trial court and confirmed by a late General Term), that a limited partnership, which had been succeeded by a general partnership which failed seven months after the termination of the limited partnership, was insolvent at its termination.

5. APPEAL — GENERAL EXCEPTION. Upon an appeal to the Court of Appeals, a general exception to the findings, taken after the close of the trial, when there was no opportunity to meet the point by amendment or otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have been successfully met and answered.

6. EQUITY — PERSONAL MONEY JUDGMENT. A court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution.

Baily v. Hornthal, 89 Hun, 514, affirmed.

(Argued December 9, 1897; decided January 11, 1898.)

N. Y. Rep.]

Statement of case.

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department, entered October 23, 1895, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

From the 1st of May, 1886, to the 30th of April, 1891, the defendants composed a limited partnership, organized under the firm name of "Weis Brothers," pursuant to the laws of the state of Texas, with Albert and Robert Weis, of Galveston, in that state, as general partners, and Lewis M. Hornthal, of the city of New York, as special partner, the contribution of the latter to the capital being \$50,000. This partnership was several times renewed, the date of the last renewal being April 12th, 1890, and the duration thereof, as then fixed by the articles, was to be from the 30th of April, 1890, until the 30th of April, 1891. It was not renewed after the date last named, but, without any agreement upon the subject, the general partners retained the assets and continued the business at the same place in Galveston, under the old firm name. On the 5th of November, 1891, the new firm failed owing over \$700,000, of which \$315,208.51 was unsecured, while the only assets to meet it were cash and accounts estimated at the time as worth the sum of \$166,404.23. The apparent deficit amounted to about \$150,000, and the evidence tended to show an actual deficit of over \$200,000. On the 23rd of May, 1891, Albert and Robert Weis paid, by an indirect method not necessary to describe, to the defendant Hornthal, \$25,000 on account of his contribution of \$50,000 to the capital of the limited partnership. At the time of the failure, in November following, Hornthal was preferred in a trust deed executed by Albert and Robert Weis to one Lewy, for the benefit of certain creditors, for the remainder of his capital contribution, amounting, with interest, to \$26,433.34. About a year after the failure he received from the trustee the amount thus preferred by the trust deed, making, with interest, \$27,243.95, at the date of payment, which was prior to the commencement of this action. The trustee has closed his trust by disposing of all the

property transferred to him and applying the proceeds, less expenses, upon the debts or claims preferred.

The claim of the plaintiffs Baily arose mainly upon a contract made on the 13th of April, 1891, by Robert Weis, in the name of the special partnership, for goods to be delivered to that firm, a small part at once and the rest in May, June and July following. Under this contract goods to the amount of \$499.80 were delivered to the limited partnership before it expired, and the rest were delivered, including a second order given in June, 1891, some months after it had expired, to Albert and Robert Weis, who were doing business under the firm name of the Weis Brothers, as aforesaid.

The claim of the plaintiff Talcott was under a contract made March 13, 1891, whereby the purchasing agent of the limited partnership ordered of him, in the name of the firm, goods to the amount of \$742.08, to be delivered in May, June and July following, and which were delivered accordingly to Albert and Robert Weis, under their said firm name. By the terms of both of these contracts the goods were not to be paid for until after the first of October, but there was no option to either party to cancel the order.

The statutes of the state of Texas relating to limited partnerships and fraudulent conveyances were read in evidence upon the trial, and they are the same in substance as the statutes of our own state relating to those subjects. By article 3457 of the statutes of that state it is provided that "If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of the capital, with interest;" and by article 3463 that "In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the partnership shall be satisfied." (Act of May 12, 1846; P. D. 4732, 4739.) By article 2465, relating to fraudulent conveyances, it is provided that "Every gift, conveyance, assignment or transfer of, or charge

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upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of, or from what they are, or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void."

Upon the trial at Special Term the foregoing facts with many others appeared, and the justice presiding decided in favor of the plaintiffs. The decision was general in form, but stated as the grounds thereof, "That on and prior to April 30, 1891, the date of the termination of the special partnership of Weis Brothers, and at all times since said special partnership, the succeeding general partnership of Weis Brothers and Albert Weis and Robert Weis were and are largely insolvent; that on and prior to the said April 30th, 1891, the special capital of defendant Hornthal in said special partnership was wholly exhausted; that the payments to him of his special capital and interest amounting to more than \$50,000, were not for value or in satisfaction of any valid claim, but were entirely voluntary; that these payments were made in violation of the statutory prohibition against withdrawals by and preference of special partners and transfers made in contemplation of insolvency, or with intent to hinder, delay and defraud creditors; that said payments were and are fraudulent and void alike as against creditors of said special partnership of Weis Brothers, and also against creditors of the succeeding general partnership of Weis Brothers, and against creditors of Albert Weis and Robert Weis, including these plaintiffs; that it is immaterial whether the plaintiffs are creditors of the special partnership, or of the said general partnership, and that defendant Hornthal is liable to plaintiffs to the amount of their claims, with interest, for the moneys so paid to him." Judgment was directed accordingly, which, upon appeal taken by the defendant Hornthal, only, to the General Term, was affirmed by a divided vote, and from the judgment of affirmation Mr. Hornthal has appealed to this court.

George Hoadly and *F. P. Delafeld* for appellant. A limited partnership is one, of the beginning and end of which knowledge is given to the whole world by publication according to law, and when the copartnership has ended, the authority to bind the special partner ends, and during the term of the copartnership, it is not within the scope of the authority of the general partners as agents to bind the special partner by agreements to be performed after both their and his connection with the firm must, according to its published terms, have ceased, or to be performed by or to others than the members of the limited partnership as such. (Benj. on Sales, §§ 3, 308, 352; *Stephens v. Santee*, 49 N. Y. 35; *Cornell v. Clark*, 104 N. Y. 451; *Pinder v. Wilks*, 1 Marshall, 248; *Pusey v. Dusenbury*, 75 Penn. St. 437; *Union Nat. Bank v. Underhill*, 102 N. Y. 336; *Pinckney v. Keyler*, 4 E. D. Smith, 469.) Hornthal is not liable to creditors of the subsequent general partnership of Weis Brothers. (*Miller v. Miller*, 23 Me. 22; *Reed v. Woodman*, 4 Me. 400; *Usher v. Hazeltine*, 5 Me. 471; *Quimby v. Dill*, 40 Me. 528; *Moritz v. Hoffman*, 35 Ill. 553; *Baker v. Gilman*, 52 Barb. 26; *Jackson v. Post*, 15 Wend. 588; *Phillips v. Wooster*, 36 N. Y. 412; *Dunlap v. Hawkins*, 59 N. Y. 342; *Carr v. Breese*, 81 N. Y. 584.) Hornthal's capital was not withdrawn during the limited partnership. (*Hogg v. Orgill*, 34 Penn. St. 344; *Lachaise v. Marks*, 4 E. D. Smith, 610; *Mattison v. Demarest*, 4 Robt. 161; *Harris v. Murray*, 28 N. Y. 577.) The limited partnership was not insolvent when dissolved. (*Jones v. U. R. Co.*, 18 App. Div. 267; *Emmerich v. Hefferan*, 26 J. & S. 217; *Townsend v. Westcott*, 2 Beav. 340; *Mackay v. Douglas*, L. R. [14 Eq. 106]; *Crossley v. Elworthy*, L. R. [12 Eq. 458]; *Carlisle v. Rich*, 8 N. H. 44; *Wallace v. Hull*, 28 Ga. 68; *Coghill v. Boring*, 15 Cal. 213; *Sufford v. Grout*, 120 Mass. 20; *Walrod v. Ball*, 9 Barb. 271.) Personal judgment against Hornthal was erroneous. (*Innes v. Lansing*, 7 Paige, 583.)

Charles E. Hughes and *Arthur C. Rounds* for respondents. The payments to Hornthal were fraudulent as against the

creditors of Albert Weis and Robert Weis. (*Knapp v. Simon*, 96 N. Y. 292; *F. L. & T. Co. v. H. R. R. Co.*, 152 N. Y. 254; *Reeder v. Sayre*, 70 N. Y. 180; Baylies on New Trials, 166; *Murtha v. Curley*, 90 N. Y. 372; *Amherst College v. Ritch*, 151 N. Y. 321.) The limited partnership was insolvent on April 30, 1891, the date of its dissolution, and the judgment debtors were continuously insolvent from that time until their failure in the following November. (*Thompson v. Thompson*, 4 Cush. 127; *Toof v. Martin*, 13 Wall. 40; *Buchanan v. Smith*, 16 Wall. 277; *Riper v. Van Poppenhausen*, 43 N. Y. 68; *Herrick v. Borst*, 4 Hill, 652; *Menagh v. Whitwell*, 52 N. Y. 146; *Taylor v. Coenen*, L. R. [1 Ch. Div.] 636; *Churchill v. Wells*, 7 Coldw. 365; *Paulk v. Cook*, 39 Conn. 566.) The payments to Hornthal were not in satisfaction of any valid claim, but were entirely voluntary. (*Harris v. Murray*, 28 N. Y. 574; *Coleman v. Burr*, 93 N. Y. 17; *Peyser v. Myers*, 135 N. Y. 604; *Darby v. Gilligan*, 33 W. Va. 249; *Menagh v. Whitwell*, 52 N. Y. 161; *Innes v. Lansing*, 7 Paige, 583; *Van Alstyne v. Cook*, 25 N. Y. 489; *Hardt v. Levy*, 72 Hun, 225; *Todd v. Nelson*, 109 N. Y. 327; *Paulk v. Cooke*, 39 Conn. 566.) Plaintiffs, as creditors of the limited partnership, are entitled to recover against Hornthal to the extent of the indebtedness contracted before April 30, 1891. (*Bell v. Merrifield*, 28 Hun, 219; *King v. Sarria*, 7 Hun, 167; 69 N. Y. 24; *Lawrence v. Batcheller*, 131 Mass. 504; *Leonard v. C. S. N. Co.*, 84 N. Y. 48; *Dennick v. Railroad Co.*, 103 U. S. 11; *Kennedy v. Porter*, 109 N. Y. 552; *Briggs v. Briggs*, 15 N. Y. 471; *Merrill v. Blanchard*, 7 App. Div. 167; *Whiting v. Farrand*, 1 Conn. 60; *Mason v. Tiffany*, 45 Ill. 392.)

VANN, J. This is a creditors' action wherein the plaintiffs, as judgment creditors of Albert and Robert Weis, with executions returned unsatisfied, seek to reach a specific fund in the hands of the defendant Hornthal upon the theory that he has no right to the same, as against the creditors of said judgment debtors, because he received it from them virtually as a gift when they were insolvent.

While some of the allegations of the complaint are adapted to an action at law to charge Mr. Hornthal as a general partner, the action was tried and decided as an action in equity, in the nature of an ordinary creditor's bill, to reach assets of Albert and Robert Weis, transferred to said Hornthal in fraud of their creditors. The relief demanded, the evidence admitted without objection, the statements made by both court and counsel during the trial, as well as the decision and judgment, all show that this was the theory of the action as accepted by all who took part in the trial. Thus, after various judgment rolls and executions had been read in evidence, but before any oral evidence was received, and as the plaintiff was about to read a deposition taken by stipulation, the defendants' counsel remarked that "so far as there is an attempt by this testimony to establish that class of irregularities, which, according to the statutes of Texas, would make Mr. Hornthal a general partner, there can be no recovery under this complaint; but if the gentleman confines his case to his statement made in opening, that he simply claims that Mr. Hornthal received \$50,000 which he ought not to have received, then there is no well-founded objection to this testimony, or any part of it." Immediately after this statement the trial judge said: "This is a creditor's action to reach a specific fund," and both parties apparently acquiesced in this declaration by the court as to the theory of the action. At no time during the trial was the position thus taken changed by the counsel for either party, and the opinions, both of the Special and General Term, show that this was the view that they took of the nature of the action. We shall confine our review to the theory, adopted by the parties and the courts below, that the action was in equity to reach assets fraudulently transferred by insolvent debtors, because, as we have frequently held, it is the duty of the trial court, in the absence of objections to evidence or to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of action established by the evidence. (*Knapp v. Simon*, 96 N. Y. 284, 292; *Frear v. Sweet*, 118 N. Y. 454, 458; *Sterrett v. Third National Bank*

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of *Buffalo*, 122 N. Y. 659, 662.) The record before us shows no exception taken by the defendant to any ruling of the trial judge relating to the admission or exclusion of evidence. There was no motion for a nonsuit or to dismiss the complaint, and no question was raised by answer, demurrer or otherwise as to a defect of parties, plaintiff or defendant. The only exceptions that we find in the record are those taken to the written decision of the trial judge upon which the judgment in question was entered. It is unnecessary, therefore, for us to decide whether a contract, made by one of the general partners, in the name of a limited partnership, without the knowledge or authority of the special partner, for goods to be delivered to such partnership after the date fixed by the articles for its expiration, is binding upon the special partner. The question that now confronts us is whether the limited partnership was insolvent when it expired, and, if so, whether the special partner, in the absence of any agreement upon the subject, can retain the capital that he had contributed to the firm, when paid to him by the general partners after they had become insolvent, as against creditors whose claims were in existence when the payment was made. Whether the debts upon which the plaintiffs recovered judgment were contracted in April, 1891, when the goods, with an unimportant exception, were actually ordered, but under such circumstances as are claimed not to bind the special partner, or in the summer following, when the goods were actually received by the general partners, under such circumstances as to raise an implied promise on their part to pay for them, is not important on this appeal, for, even upon the latter basis, both debts were in existence when the trust deed was given, which resulted in the payment to the appellant of \$27,343.95 in behalf of the judgment debtors before this action was commenced.

The trial court found that the limited partnership was insolvent when it terminated on the thirtieth of April, 1891, and that since that date the succeeding general partnership, as well as the general partners, have continuously been

insolvent. If this is true, the capital of the special partner was exhausted and the general partners had no right to pay him and he had no right to receive from them anything on account thereof, at least in the absence of an agreement made in good faith, in ignorance of the fact of insolvency and without knowledge of such facts as would put a prudent man upon inquiry.

As is well said by Mr. Lindley in his work on Partnership, "The present share of a partner in an insolvent firm is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share, is defrauding the creditors of the firm." (Lindley on Partnership, *573.) This applies with the same force to a limited as to a general partnership, for, necessarily, the capital of either kind of association is consumed when the assets are less than the liabilities. The contribution of the special partner is at the risk of the business the same as that of the general partners, and when both are lost by insolvency there is no foundation for a claim of restoration by either. There is no evidence of any express agreement as to the disposition of assets after the dissolution, and the good faith of any implied agreement is negatived by the finding of the trial judge to the effect that the payments made by the general partners to the special partner "were not for value or in satisfaction of any valid claim, but were entirely voluntary;" that they were made "with intent to hinder, delay and defraud creditors," and that they were fraudulent as against the creditors of the general partners. As the facts found by the trial court have been confirmed by the General Term, although apparently after some hesitation, we can only look into the evidence to see whether there was any to support the conclusion of the courts below. (*White v. Benjamin*, 150 N. Y. 258.)

As bearing on the question of insolvency, which is of controlling importance, we have the fact that six months after the dissolution of the special partnership, the general partners,

who continued the same business with the same assets, failed, owing over \$700,000, of which more than \$314,000 was unsecured, and, as stated by Mr. Hornthal in his evidence, "the amount which could be depended on to settle with the creditors who were not secured by the trust deed was \$166,000, and the amount that that \$166,000 had to meet was \$314,000 and more." Thus an admitted deficiency of about \$150,000 arose within a comparatively short time after the dissolution, and yet no very heavy losses were sustained in the meantime. The volume of the yearly business did not exceed \$800,000, which would make \$400,000 for the six months in question, so that the deficiency, as conceded, amounted to thirty-seven per cent of the gross amount of business done. To this admitted deficiency the inference was permissible that certain additions should be made, because the accounts classified as good, in reaching the deficiency of \$150,000, proved uncollectible to the extent of nearly \$60,000, and there was \$30,000 left unpaid upon the claims secured by the trust deed when the trust was closed. While there is no presumption that the firm was insolvent in April because its successor failed in November, the difference between the assets and liabilities at the latter date was so overwhelmingly large as to require explanation, but no satisfactory explanation was given. Evidence was furnished tending to show a net loss of \$32,000 during the intervening period, and the drawings of the copartners for the year were between \$20,000 and \$30,000, of which not more than one-half can fairly be assigned to the last six months. No sudden or unusual depreciation in the value of merchandise was shown. The stock on hand brought seventy cents on the dollar when sold by the trustee, but there was more sacrifice in disposing of some of the other assets. Doubtless there was an accumulation of old and unsalable stock, the same as there had been an accumulation of stale and uncollectible accounts, but this was the result of the business of years, not of the last six months. One of the general partners testified that "the only cause for the failure, the substantial cause I would give, would be losses of bad accounts running a number of years

back." Mr. Hornthal, when shown a letter written by him on the 2d of December, 1891, to certain creditors for the purpose of obtaining a settlement for the Weis Brothers, in which he included, among other assets, some bills receivable amounting to \$387,386.84, testified that "a very small amount, probably not over \$1,000 or \$2,000," was collected out of this large sum. Albert Weis stated the cause of the failure to be "heavy losses in business which were sustained. Bills of goods were sold we did not get any money for. We did an extensive credit business and did not collect. Those losses were two or three years before our failure." He thought "perhaps about one-third" of the bad debts accrued during the last year, but stated that some of the accounts began a good many years ago and were in judgment. On cross-examination he said that "there was no considerable shrinkage in the value of our outstanding notes and accounts from the 30th of April, 1891, to the date of our failure," and on the redirect, that he was "almost certain that our indebtedness was larger in 1890 than it was in 1891." Both the limited partnership and the general partnership that succeeded it had large accommodations from the banks. Old notes were taken up by new discounts and there was a shifting of creditors through the purchase of new goods, and the use of the proceeds to pay old debts. Thus, one of the general partners testified: "We did not pay up one set of spring purchases before the fall purchases began to come in. They always lap. We never get out of debt. Our accommodations at the bank ran right along the same way, lapped over all the time. We discount and rediscount as we need the money right along." Their credit was good all the time, but credit, which enables one to contract debts, should not be confounded with solvency, which enables one to pay debts. The ability to run in debt is not the same as the ability to pay up, nor will it relieve either firm from the imputation of insolvency to say that, as soon as the failure took place, it was followed by the failure of some of their debtors, and the refusal to pay by others, who had kept on paying as long as they could obtain more goods on credit. Nothing appears in

the evidence to show that this would not have happened if the affairs of the limited partnership had been closed in the usual way at the date of dissolution. The fact that the practical value of assets may depend, to some extent, upon the continuance in business by the owner, has no application to this case, for the limited partnership did not continue in business, but ceased to exist on the last day of April, 1891. A concern is not solvent unless it has property enough to pay its debts. An account that depends for collection upon the volition of the debtor, and his hope of further advantage, cannot be counted as an available asset, for, when liquidation comes, those accounts prove uncollectible. The nominal value of unsalable goods and uncollectible accounts has little to do with actual solvency, which depends upon the amount that can be realized from the assets, when converted into money without unreasonable haste or sacrifice, as compared with the amount of liabilities. While the evidence did not compel, it permitted, the conclusion that if the affairs of the limited partnership had been wound up at the date of dissolution by any reasonable process of liquidation, there would not have been assets sufficient to meet the liabilities. One of the general partners had no private property, and the other had no more than enough to pay his personal debts. The controlling fact of insolvency, as applied to the old firm and the new, as well as to the general partners, for the insolvency of the firm involved them personally, having been found by the courts below upon sufficient evidence, must be accepted by us as final for the purpose of this review. The payments to Mr. Hornthal, therefore, were not in satisfaction of a valid claim, but were in the nature of a gift, although nominally a restoration of capital. He was not entitled to the return of his contribution to the capital in any event, for the articles are silent upon the subject, but only in case the firm was solvent and there was a surplus after the payment of debts. After the dissolution there was no accounting and no balance struck, but matters were left in the same unsettled condition as before, so that he had no enforceable claim for the return of

his special capital either against the new firm or the general partners. Passing by the first payment to him of \$25,000, made in May, 1891, owing to the question whether the claims of the plaintiffs were then in existence, we think they were entitled to reach the payment made under the trust deed, which was more than enough to satisfy their judgments. There can be no doubt that the indebtedness to the plaintiffs had then arisen and the judgment debtors owed Hornthal nothing when they gave him security for \$26,433.34, all of which, with interest, was subsequently paid to him. He had no right to receive it and took no title thereto as against creditors in the situation of the plaintiffs, who are armed with judgments recovered and executions returned unsatisfied. (*Bell v. Merrifield*, 109 N. Y. 202.)

The point now made, that the unpaid creditors under the trust deed, which was not a general assignment or for the benefit of creditors generally, are entitled to the fund in preference to judgment creditors, was not raised either by the pleadings or by an exception to any ruling made during the trial. *Non constat*, if it had been thus raised, it would either have been answered by proper evidence, or the complaint would have been amended and other parties brought in if necessary. The plaintiffs were entitled to such a judgment as the pleadings and the evidence warranted, without regard to the possible rights of third parties, that were not brought to the attention of the trial court and are the subject of no exception taken while the trial was in progress. Upon an appeal from a judgment in a civil action, the Court of Appeals can decide no question, except one not now important, unless it is raised by demurrer, or is founded on an exception taken in due time. A general exception to the findings, taken after the close of the trial, when there was no opportunity to meet the point by amendment or otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have then been successfully met and answered.

A personal judgment against Mr. Hornthal was proper, for a court of equity may adapt its relief to the exigencies of the

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case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution. (*Murtha v. Curley*, 90 N. Y. 372.) The form of judgment does not determine the nature of the action. In this case the judgment is in the form of one rendered in an action at law, yet the plaintiffs could not have prevailed without first showing that they had exhausted all their remedies at law. Having a judgment against the Messrs. Weis only, they could not issue an execution against Mr. Hornthal without first obtaining a decree of a court of equity that the latter had money in his hands which equitably belonged to the creditors of the former. As no property was to be sold, no receiver was needed, and, under the circumstances, a money judgment was precisely the relief that a court of equity should have rendered.

The judgment should be affirmed, with costs.

All concur, except O'BRIEN and HAIGHT, JJ., who dissent.

Judgment affirmed.

FRANK J. FREEL et al., as Executors of EDWARD FREEL,
Deceased, Appellants, v. THE COUNTY OF QUEENS,
Respondent.

1. APPEAL — APPELLATE DIVISION — PRACTICE — MODIFICATION OF JUDGMENT. When, on appeal from a judgment awarding the plaintiff a gross sum, in a common-law action upon several distinct causes of action where the amount claimed on each is definite and easily separable, it appears that the plaintiff is entitled to recover upon one cause of action, but under no circumstances could he recover upon either of the others, the Appellate Division should not reverse the judgment and order a new trial unless the plaintiff stipulates to reduce the judgment, but it should modify the judgment by making the proper reductions, and then affirm it as modified.

2. COURT OF APPEALS. If the Appellate Division, in such a case, reverses the judgment and orders a new trial unless the plaintiff stipulates to reduce the judgment, the Court of Appeals, on appeal by the plaintiff with a stipulation for judgment absolute, can render the judgment of modification and affirmance which should have been rendered by the Appellate Division.

Freel v. County of Queens, 9 App. Div. 186, modified.

(Argued December 13, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1896, reversing a judgment in favor of the plaintiffs, entered upon the report of a referee, and ordering a new trial, unless the plaintiffs should stipulate to reduce the recovery to the sum of \$1,730, with interest from January 1, 1894, in which event the judgment was to be modified and affirmed accordingly.

This action was brought to recover a balance alleged to be due on a contract, and also to recover the value of extra work done in connection therewith.

William C. De Witt for appellants. The commissioners had the right and power, when acting in good faith, to order and direct the doing of additional work, and the furnishing of additional material found in the progress of the work to be incidentally needful and appropriate to the proper and skillful construction of the highways, and if such work and material were not embraced in the written contract, an obligation arose on the part of the county, when it was so done and furnished, to pay the reasonable value thereof. (*Fleming v. Vil. of Suspension Bridge*, 92 N. Y. 368; *Abells v. City of Syracuse*, 7 App. Div. 501; *Messenger v. City of Buffalo*, 21 N. Y. 196; *Mullholland v. Mayor, etc.*, 113 N. Y. 631; *Kingsley v. City of Brooklyn*, 78 N. Y. 200; *People ex rel. v. Spicer*, 99 N. Y. 229; *Brady v. Mayor, etc.*, 20 N. Y. 319; *Weston v. City of Syracuse*, 82 Hun, 67; *Moore v. Mayor, etc.*, 73 N. Y. 238.) The commissioners were county officers, intrusted with the duty of constructing and improving certain highways, and any expense by them incurred for the use and benefit of the county is rightfully recoverable from the county. (*People ex rel. v. Nostrand*, 46 N. Y. 383; *Rowland v. Mayor, etc.*, 83 N. Y. 376; *People ex rel. v. Board of Canvassers*, 129 N. Y. 360; *People ex rel. v. Common Council of Brooklyn*, 77 N. Y. 503; L. 1869, ch. 855, § 2.) There was sufficient evidence to sustain the findings of fact by the referee. Those findings are not before this court

for review upon the order entered by the Appellate Division, and they justify the judgment entered upon the referee's report, which must, therefore, be affirmed. (*Weyer v. Beach*, 79 N. Y. 411; *Riendeau v. Bullock*, 147 N. Y. 272; *Smith v. Pettee*, 70 N. Y. 13; *Davis v. Leopold*, 87 N. Y. 620; *Kane v. Cortesy*, 100 N. Y. 132; *N. Y. & B. F. Co. v. Moore*, 102 N. Y. 667; *Messenger v. City of Buffalo*, 21 N. Y. 196.) There can be no doubt of the plaintiffs' right to recover the amount due on the contract for the Merrick road, which has been wrongfully retained as a penalty for delay. (*Gallagher v. Nichols*, 60 N. Y. 438; *Guidet v. Mayor, etc.*, 4 J. & S. 557; *Homer v. G. M. L. Ins. Co.*, 67 N. Y. 478.)

Townsend Scudder for respondent. The county of Queens is liable only for work covered by the contract approved by its board of supervisors. (Const. N. Y. art. 3, § 28.) The commissioners of highway improvements could not bind the county except by a contract approved by the board of supervisors. (*McDonald v. Mayor, etc.*, 68 N. Y. 23; *Smith v. City of Newburgh*, 77 N. Y. 130; L. 1892, ch. 686, § 3.)

VANN, J. We have reached the conclusion that the plaintiffs were entitled to recover on the first cause of action alleged in their complaint for the balance due on the contract for improving the Merrick road, and that they were not entitled to recover upon the second or third causes of action relating to extra work connected with the contracts for improving Van Wyck avenue and Broadway and Liberty avenue, for the reasons given by the learned Appellate Division in its opinion. (*Freel v. County of Queens*, 9 App. Div. 186.) That court reversed the judgment entered upon the decision of the referee and granted a new trial unless the plaintiffs would stipulate within a given period to reduce their judgment by deducting the sums allowed on the second and third causes of action and confining it to the amount recovered upon the first cause of action. The plaintiffs did not so stipulate, but appealed to this court, giving the usual stipulation for judg-

ment absolute against them in case of affirmance. As we have reached the same conclusion as to the rights of the parties to which the Appellate Division arrived, and must substantially affirm their judgment, the question arises whether, even the amount that all the courts have decided the plaintiffs were entitled to recover on the first cause of action can, under the peculiar circumstances, be awarded to them. No embarrassment is caused by the learned counsel for the respondent, who, with great fairness, stated upon the argument that he was willing that the plaintiffs should recover that amount if the practice permitted it. The new trial granted necessarily extends to the entire claim, as otherwise there might be conflicting judgments in the same action. If, however, the Appellate Division should have modified the judgment by reducing the recovery to the proper amount, and should have affirmed it as modified, without granting a new trial, we can render the judgment that they should have rendered.

In *Wright v. Nostrand* (98 N. Y. 669) it was held that while the plaintiff, a receiver appointed in supplementary proceedings, was entitled to have certain conveyances of real estate set aside, he was not entitled to recover the rents and profits because he failed to show the proceedings necessary to vest in him title to the real estate. (94 N. Y. 31.) Upon a motion for a reargument the court said: "There were no errors of law affecting the judgment, but (except) the adjudication therein that the plaintiff was entitled to the rents and profits; and that portion of the judgment the General Term should have stricken out. As to that, or on that account, it should not have granted a new trial, as it was a separate matter not affecting the rest of the judgment, and the plaintiff could not in any event recover the rents and profits. It should have affirmed the judgment with that portion stricken out. We will now do what it should have done, and to that end we will reverse the order of the General Term and strike out all that portion of the judgment which relates to the rents and profits, and affirm the judgment of the Special Term, as thus modified."

In *Conklin v. Snider* (104 N. Y. 641) it was said: "The order of the General Term having been a proper one we cannot reverse, but must affirm it, and the plaintiffs' stipulation on the appeal to this court, compels an award of judgment absolute against them. We have once or twice, in cases where the error which might have justified a reversal was merely incidental and capable of accurate correction, modified the judgment by correcting the error, but those were instances in which we thought a new trial ought not to have been awarded, (*Wright v. Nostrand*, 98 N. Y. 669), since there could be no recovery for what had been erroneously allowed. Here such a recovery was possible, and the award of a new trial was a proper order for the General Term to make, and we must affirm it and order judgment absolute, although we can see that plaintiffs might have been entitled to a part of their relief. (*Gray v. Board of Supervisors*, 93 N. Y. 603, 608; *Thomas v. N. Y. Life Ins. Co.*, 99 id. 250; *Godfrey v. Moser*, 66 id. 250.) They chose to take the peril of their stipulation."

In *Goodsell v. Western Union Tel. Co.* (109 N. Y. 147) the action was brought to recover upon two separate and distinct causes of action and the referee reported "in favor of the plaintiff for upwards of \$16,000 upon his first cause of action, and for upwards of \$220,000 upon his second cause of action, and judgment was rendered in favor of the plaintiff for a gross sum of upwards of \$240,000 besides costs." The General Term affirmed the judgment as to the first cause of action, but reversed and granted a new trial as to the second, and the defendant appealed from the judgment of affirmance as to the first cause of action. This court held that the General Term had no power to affirm the judgment as to one cause of action and reverse it and grant a new trial as to the other, but, in the course of its opinion, said: "A new trial in a common-law action against a single defendant can be granted only as to the whole action, and so far the common-law rule is still in force. If, however, in such a case, there is error affecting only part of the judgment, and the

record be in such condition that by a reversal in part, or by a modification thereof, the error can be eliminated and the judgment can thus be made right without a new trial, the Code confers power upon appellate courts to make the correction or modification." (See, also, *Anthony v. Am. Glucose Company*, 146 N. Y. 407, 418.)

In the case now before us the plaintiff was clearly entitled to recover upon the first cause of action, but under no circumstances could he recover upon either of the others, so that a new trial was unnecessary. Complete justice could have been done to both parties by so modifying the judgment as to reduce it to the amount awarded on the first cause of action, and, as thus reduced, affirming it. Each cause of action was distinct, being founded upon a separate and independent contract or claim. The amount claimed on each was definite and could be easily separated from the judgment rendered in gross for the entire sum alleged to be due. No evidence that can reasonably be supposed to exist could change the result as to the second or third causes of action, because there can be no recovery upon them owing to the ordinance of the board of supervisors, which limited the power of the commissioners appointed to make the improvements. Under these circumstances, we think that the learned Appellate Division should not have reversed the judgment, but should have modified it by making the proper reduction and affirming it as thus modified. The Code gives us the power to render the judgment that they should have rendered, and accordingly we direct that their judgment be so modified as to reduce the amount of the judgment awarded by the referee to the sum of \$1,730, with interest from January 1, 1894, and, as thus modified, affirmed, without costs, either in the Appellate Division or in this court.

All concur, except O'BRIEN, J., not voting.

Judgment accordingly.

WILLIAM FERNSEHILD, Appellant, v. D. G. YUENGLING BREWING COMPANY; COMMODORE P. VEDDER, as Receiver of the D. G. YUENGLING BREWING COMPANY, Substituted Defendant, Respondent.

CORPORATIONS — REORGANIZATION — PROVISION FOR OUTSTANDING MORTGAGE BONDS. Upon a reorganization of an insolvent corporation, which had bonds outstanding secured by a second mortgage on its realty, the successor corporation acquired the realty through foreclosure of a prior mortgage. By the reorganization agreement, the new company agreed to provide for the outstanding bonds by issuing new ones in their stead, at a lower rate of interest, to assenting bondholders, and by a distribution, to non-assenting bondholders, of their distributive share in the proceeds of the sale of the mortgaged property. The directors of the new company adopted a resolution, to the effect that it assumed all the debts and obligations of the old company, "in addition to the bonds and other obligations mentioned in the agreement of reorganization," in consideration of a transfer of the old company's personal property. A bill of sale from the old company, of all its property except that covered by the mortgage, was then delivered to the new company, in which it was stated that, in consideration of such transfer, the new company assumed the payment of all the debts and obligations of the old company, excepting its mortgage bonds, and excepting all other indebtedness, otherwise provided for in the agreement of reorganization. *Held*, that the new company did not assume the payment of the old mortgage bonds.

Fernsechild v. Yuengling Brewing Co. 15 App. Div. 29, affirmed.

(Argued December 13, 1897; decided January 11, 1898.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department (in a case transferred from the first department), entered March 16, 1897, reversing a judgment of the Appellate Term of the Supreme Court in the first judicial district in favor of plaintiff and affirming a judgment in favor of defendant, rendered by the General Term of the City Court of the city of New York.

This action was brought against the D. G. Yuengling Brewing Company to recover on bonds executed by the D. G. Yuengling, Jr., Brewing Company, the predecessor of the defendant company, the payment of which the plaintiff claims was assumed by the latter company.

The defendant corporation having been dissolved, Commodore P. Vedder was appointed receiver, and was duly substituted as defendant while the appeal to the Court of Appeals was pending.

The facts, so far as material, are stated in the opinion.

George P. Hotelling for appellant. The Appellate Division erred in holding that the bill of sale could not be varied by the resolution. (*Brady v. Nally*, 151 N. Y. 258; *Hankinson v. Vantine*, 152 N. Y. 20; *Higgins v. Ridgway*, 153 N. Y. 130; *Blewitt v. Boorum*, 142 N. Y. 357; *C. Nat. Bank v. Faurot*, 149 N. Y. 537.) The intent clearly appears to assume all the debts so as to get a good title to the unmortgaged assets. The intent is found, not by a mere inspection of one clause in the bill of sale, but of all the papers and acts and by considering the situation and relations of the parties and the subject-matter of the negotiations and the surrounding circumstances. (*Clark v. Devoe*, 124 N. Y. 120; *Blackman v. Striker*, 142 N. Y. 555; *Coyne v. Weaver*, 84 N. Y. 386; *Bank of Montreal v. Recknagel*, 109 N. Y. 482; *E. Bank v. Roche*, 93 N. Y. 374.) The bill of sale was not the agreement. It was tendered as a transfer of title only on a condition which was accepted by the defendant passing the resolution. The contract, therefore, really consists of the bill of sale, the condition imposed as to delivery, and the resolution of acceptance by the defendant. (Jones on Com. Cont. § 229; *Rothschild v. R. G. R. R. Co.*, 84 Hun, 103.) If the facts and writings permit of two interpretations, one of which would render the transfer invalid, and the other valid, the latter construction will always be deemed the true one, and be adopted by the courts. (*Coyne v. Weaver*, 84 N. Y. 386; *Darrow v. Family F. Society*, 116 N. Y. 537; *Belden v. Burke*, 72 Hun, 51; *Hobbs v. McLean*, 17 U. S. 567; *Cole v. M. I. Co.*, 133 N. Y. 164; *People v. Ballard*, 134 N. Y. 269.) If there is any reasonable doubt as to the meaning of the writings, it is to be construed most favorably to the creditors, because the defendant procured the bill of sale and passed the

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resolution by which it got possession and title to the property, and is responsible for the language used. When the words of a promise may have been used in an enlarged or restricted sense, they are generally to be construed in the sense most beneficial to the promisee. (*Rothschild v. R. G. R. R. Co.*, 84 Hun, 103; *Jackson v. B. W. Co.*, 91 Hun, 435; *Halpin v. Ins. Co.*, 120 N. Y. 73; *Belden v. Burke*, 72 Hun, 51; 32 N. Y. 405.) The statute law as to the reorganization of corporations does not aid this defendant. (L. 1892, ch. 691, §§ 3, 4.) The plaintiff's bonds were not merged in the foreclosure judgment. It is conceded that they were payable only to the plaintiff and not to the trustee, and the mortgage contained no covenant to pay the principal or interest to the trustee. This suit, however, is based really upon an agreement of assumption, made after the foreclosure judgment was entered. (*Bowditch v. Page*, 153 N. Y. 104; *F. Nat. Bank v. Shuler*, 153 N. Y. 170.) The reversal by the Appellate Term and order for judgment for plaintiff without a new trial was correct, as the defendant's liability depends solely upon the interpretation of undisputed writings and records. On the appeals below defendant conceded that only an issue of law was involved. (*Stewart v. Arendt*, 16 Misc. Rep. 45; *Wood v. Baker*, 60 Hun, 337; *Van Slooten v. Wheeler*, 21 N. Y. Supp. 329; *Bradley Co. v. S. B. Co.*, 4 Misc. Rep. 172; *Price v. Price*, 33 Hun, 434; *Brackett v. Griswold*, 128 N. Y. 644; *King v. Barnes*, 109 N. Y. 267.) The plaintiff on reversal should have restitution of his rights under the execution and levy, lost by reason of the erroneous judgment of the Appellate Division. (Code Civ. Pro. § 1323; *King v. Harris*, 34 N. Y. 330; *Gillig v. Treadwell Co.*, 151 N. Y. 552; *Murray v. Berdell* 98 N. Y. 480; *Carlson v. Winter-son* 146 N. Y. 345.)

Samuel Untermeyer and *Moses Weinman* for respondent. The defendant did not assume the bonds of the D. G. Yuengling, Jr., Brewing Company. The clear intent was that they should not be assumed. (Cook on Corp. Law, § 886; *Matter*

of *Hermance*, 71 N. Y. 481; *People v. N. Y. & M. B. R. Co.*, 84 N. Y. 565; *People v. Richards*, 108 N. Y. 137.) The defendant is a corporation organized under the statute permitting the reorganization of old corporations. Under this statute, the powers of a new corporation are limited to the plan of reorganization. The defendant, therefore, had no power to agree to pay the plaintiff's bonds. (L. 1892, ch. 688.) The bonds sued upon and all the plaintiff's rights are merged in the judgment procured by the Farmers' Loan and Trust Company, as trustee for all the bondholders. (Freeman on Judgments, §§ 215, 216; *G. P. & R. M. Co. v. Mayor, etc.*, 108 N. Y. 276; *Mallory v. Leech*, 14 Abb. Pr. 449; *Kerr v. Blodgett*, 48 N. Y. 62.)

O'BRIEN, J. The plaintiff owned two one-thousand dollar bonds issued by a corporation to which the defendant succeeded by a process of reorganization. The name of the corporation that had issued the bonds differed from that of the defendant only in the use of the word "junior" after the name of the person from whom both corporations derived their name. The old company was insolvent and a committee of the bondholders were engaged in reorganizing it under the statute. The plaintiff's bonds are part of an issue of \$1,258,000 by the old company secured by a second mortgage upon the plant of a brewery. The prior liens amounted to over \$302,000, and were in process of foreclosure, thus imperiling the only security that the plaintiff and his fellow-bondholders had for the payment of their obligations.

The plan of the committee was to purchase the property at the foreclosure sale, organize a new company, scale down the second mortgage bonds, issuing new ones in their place secured by mortgage from the new company. It, of course, required the assent of the bondholders, and was reduced to writing and signed by the owners of \$1,202,800 of the bonds. The plaintiff and a few others, owning in all about \$56,000 in bonds, refused to sign or, at least, did not sign.

The agreement provided that the bondholders should sur-

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render their bonds and take bonds of the new company equal to seventy-five per cent of the face value of the bonds surrendered, and, in addition, twenty-five per cent of the face value in stock of the new corporation.

The agreement further provided that in case any of the bondholders withheld their consent from the agreement, that then the new bonds issued against the old bonds of such non-assenting parties should be sold or used by the committee to pay the parties not consenting the distributive share of the proceeds of the sale of the property to which they might be entitled.

At the foreclosure sale the committee purchased the property covered by the mortgage, but this did not include the personal property, accounts and some other assets of the old company. The plant was transferred to the new company, the defendant, but the personal property had to be acquired by the new company in some other way. Besides the bonded debt the old company had a large floating indebtedness, represented by notes and open accounts. The committee arranged to have this debt assumed by the new company upon a transfer to it of the personal property, notes and accounts by the old company, and a bill of sale of the property was prepared and executed in order to effectuate that purpose. Before this bill of sale was finally delivered the directors of the new company, the defendant, passed the following resolution:

“Resolved, That this company assume all the debts, obligations and liabilities of every kind and description of the D. G. Yuengling, Jr., Brewing Company, in addition to the bonds and other obligations mentioned in the agreement of reorganization, and thereby provided to be assumed by this company, and that in return for, and as a consideration of, the assumption of said debts, obligations and liabilities, this company accept from said D. G. Yuengling, Jr., Brewing Company the bill of sale presented by the chairman transferring unto this company all the personal property, effects and chattels of every kind, including the stock in trade, book

accounts and good will of said D. G. Yuengling, Jr., Brewing Company, not included in the property covered by the trust mortgage given by said company to the Farmers' Loan and Trust Company to secure bondholders, and not heretofore acquired by this company, the intent hereof being to vest in this company all the property, right, franchises, privileges and good will of the old company, and to assume all the obligations and debts of that company, so that this company shall in all respects stand in the place and be the successor of, and so far as may be, the same corporate body as the said D. G. Yuengling, Jr., Brewing Company aforesaid."

The bill of sale was then delivered. It was executed by the old company, as party of the first part, to the defendant, as party of the second part, and conveyed and transferred to the latter all property not covered by the mortgage given to secure the old bonds, which mortgage, as we have seen, had been foreclosed, and the property embraced in it sold to the new company.

This bill of sale, however, contained the following clause:

"And the party of the second part doth hereby covenant and agree that, in consideration of said transfer as aforesaid, it will assume and doth assume the payment of all the debts and obligations of the party of the first part, excepting the mortgage bonds of said party of the first part, and excepting all other indebtedness, otherwise provided for in a certain plan or agreement of reorganization of the said party of the first part pursuant to the terms of which the party of the second part was organized."

The plaintiff has brought this action at law upon the old bonds held by him on the theory that, under the resolution referred to, or the clause above quoted from the bill of sale, or both read together, the defendant has assumed the payment of the bonds and bound itself to pay them. We are not now concerned with any question with respect to the validity of the transfer by the old company to the new of the remaining property of the corporation. Whether it was open to the plaintiff, as a creditor of the old company, to attack

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the transfer under the doctrine of *Cole v. M. I. Co.* (133 N. Y. 164), is a question not at all involved in the case. It is quite sufficient to say that this is not an action for that purpose. The only question before us is one of construction. Did the defendant contract with the old company to pay the plaintiff's debt? That question should be determined by an inquiry as to the intention of the parties derived not only from the language of the resolution and the assumption clause in the bill of sale, but the purpose which was in view and all the surrounding circumstances. If it assumed any of the old bonds it assumed them all. This, of course, would have defeated the very purpose of the reorganization. The old company was insolvent and the purpose was to scale down the bonded debt and reduce the rate of interest; but if the contention of the learned counsel for the plaintiff be correct, the new company at its very birth was in a worse financial condition than the old. It had assumed all the debts of the old company and had no additional property to pay them. It had simply acquired the property of the old company through the expensive process of foreclosure and then proceeded to make itself insolvent by assuming all of its debts. Of course nothing of that kind could have been intended, and no such idea is expressed either in the bill of sale or the resolution. The language there used is not very clear, but if we consider what took place before they were drawn and what all the parties were seeking to accomplish, there can be no doubt with respect to the meaning.

By the terms of the assumption clause in the bill of sale the defendant agreed, in consideration of the transfer of the personal property, to pay all the debts of the old company, excepting the mortgage bonds and all other indebtedness otherwise provided for in the reorganization agreement.

Now, all the old bonds had been provided for by that agreement, since they were to be retired and new bonds and stock taken in their place. It is true that the plaintiff did not assent to the agreement, but that circumstance has no weight in the construction of the language used in the bill of sale.

Whether the plaintiff assented or not, provision was made in the agreement for his bonds, since, in case of his non-assent, he was to be paid his proportionate share of the proceeds of the sale of the property, which was his only security. The debts, then, which the defendant assumed were the floating debts of the old company, which could have been collected only from the personal property transferred by the bill of sale. Those debts were not otherwise provided for, and they alone are within the scope and intention of the assumption clause.

The same debts and no others are referred to in the resolution. The defendant there assumed "all debts, obligations and liabilities of every kind and description * * * in addition to the bonds and other obligations mentioned in the agreement of reorganization, and thereby provided to be assumed by this company."

The meaning of this clause is that the defendant had assumed the old bonds in the manner stated in the reorganization agreement, that is, by issuing new bonds and stock to take their place, and was to assume the floating debt generally as the consideration for the transfer of the personal property, since that was the only debt not otherwise provided for.

The defendant doubtless became bound by the terms of the bill of sale on accepting it, though executed only by the old company, but not bound beyond its fair scope and meaning. There is really no ground for the contention that the defendant assumed or intended to assume the payment of the plaintiff's bonds in the sense claimed. The only way that it agreed to assume them was by the issue of new bonds and stock to take their place, and this method of payment the plaintiff declined to accept.

We think that the case was correctly decided below, and the judgment appealed from should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

KATE MARKEY, as Administratrix of HUGH MARKEY, Deceased,
Appellant, v. THE COUNTY OF QUEENS, Impleaded, etc.,
Respondent.

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1. COUNTIES — DEFECTIVE BRIDGE — NON-LIABILITY FOR PERSONAL INJURY. A county cannot, by any rule of law as established in this state, be held liable at the suit of a private individual, who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable.

2. MAINTENANCE OF BRIDGE A GOVERNMENTAL DUTY. Whether the maintenance of highways and bridges is devolved as a duty upon the towns, or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental; and this is especially so in respect to the duty imposed by the County Law (L. 1892, ch. 686, § 68) upon the counties, of maintaining a bridge which spans navigable waters of the state, forming a boundary line between two counties.

3. COUNTIES MUNICIPAL CORPORATIONS — THE COUNTY LAW. The provisions of the County Law (L. 1892, ch. 686) declaring a county to be a municipal corporation (§ 2), and that an action "to recover damages for any injury to any property or rights for which it is liable" shall be in the name of the county (§ 3), import no further liability on the part of a county than that which existed at their enactment.

4. DISTINCTION BETWEEN COUNTIES AND CITIES. There is a distinction between counties as civil divisions of the state for purposes of local government, and chartered municipal corporations, in respect to their liability for corporate acts. This distinction was not abrogated by the County Law, and it was not intended, by the provisions of that law, that counties should be treated as upon a par with cities, when engaged in similar transactions.

Markey v. County of Queens, 9 App. Div. 627, affirmed.

(Argued December 15, 1897; decided January 11, 1898.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 3, 1896, which affirmed a judgment in favor of defendant, entered upon a decision of the court at Special Term sustaining a demurrer to plaintiff's complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles J. Patterson for appellant. The county of Queens is a municipal corporation charged by law with the duty of maintaining the bridge in question, and is liable for failing to keep it in repair. (L. 1892, ch. 686, § 2; L. 1892, ch. 687, § 2; L. 1892, ch. 685, § 1; 1 R. S. 364, §§ 1, 2; 2 R. S. [7th ed.] 924; L. 1894, chs. 456, 461; *People ex rel. v. Bd. Suprs.*, 142 N. Y. 271; L. 1895, ch. 954, § 2; *Borough of Bathurst v. Macpherson*, L. R. [4 App. Cas.] 256; *Smith v. W. D. L. Bd.*, 3 Com. Pl. Div. 423; *White v. H. L. Bd.*, L. R. [10 Q. B.] 219; *Blackmore v. Vestry of Mile End*, L. R. [9 Q. B.] 452; *Whitehouse v. Fellows*, 10 C. B. [N. S.] 731; *Foreman v. Canterbury*, L. R. [6 Q. B.] 214; *Tucker v. Axbridge Bd.*, 5 L. T. R. 26; *Cox v. Paddington Vestry*, 64 L. T. 566; *Ruck v. Williams*, 3 H. & N. 308; *Brownlow v. Met. Bd.*, 13 C. B. [N. S.] 768; 16 C. B. [N. S.] 546; *Southampton v. Southampton Bd.*, 9 E. & B. 801-812.) If this bridge was maintained by a city or village, there would be no doubt under the decisions concerning the liability. The claim that there is a distinction between the case of such a municipal corporation and that of a county is untenable. (Dillon on Mun. Corp. §§ 15, 23; L. 1892, ch. 686; 1 Thomp. on Neg. 619; Jones on Neg. §§ 59-69; *Mahonoy v. Scholly*, 84 Penn. St. 136; *Newland v. Davis*, 77 Penn. St. 319; *Rapho v. Moore*, 68 Penn. St. 404; *Dean v. New Milford*, 5 W. & S. 545; *Anne Arundel County v. Duckett*, 20 Md. 468; *Calvert County v. Gibson*, 36 Md. 229; *Prince Georges County v. Burgess*, 61 Md. 29; *Baltimore v. Baker*, 44 Md. 1; *Flynn v. Canton Co.*, 40 Md. 312, 322; *Hanford County v. Wise*, 71 Md. 43.) The plaintiff in this action, and her children, have been deprived of their means of support by reason of the negligence of the board of supervisors of Queens county, and their employees, in failing to maintain this Meeker avenue bridge in a proper state of repair, and she is entitled to recover damages therefor. (Jones on Mun. Corp. §§ 57, 58, 68.) It was not necessary to present the claim to the board of supervisors for audit. (L. 1892, ch. 686, § 2; *McGaffin v. City of Cohoes*, 74 N. Y. 387; *Brusso v. City of Buffalo*, 90 N. Y.

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679; *Taylor v. City of Cohoes*, 105 N. Y. 54; *Gage v. Vil. of Hornellsville*, 106 N. Y. 667; *Harrigan v. City of Brooklyn*, 119 N. Y. 156.)

Townsend Scudder for respondent. A county is a corporation of limited corporate capacity and liability, and is under no liability in respect of torts. (Dillon on Mun. Corp. §§ 22, 23, 963; *Ensign v. Bd. Suprs. Livingston Co.*, 25 Hun, 21; *People ex rel. v. Stout*, 23 Barb. 338; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Bertles v. Nunan*, 92 N. Y. 152; *Fitzgerald v. Quann*, 109 N. Y. 441; *Trans. Co. v. Chicago*, 99 U. S. 635; *People ex rel. v. Bd. Suprs.*, 142 N. Y. 271; *Hill v. City of Boston*, 122 Mass. 344; *Mower v. Leicester*, 9 Mass. 247.) The maintenance of highways and bridges is a public, not a private, function of government, and for its exercise a county does not incur a liability to an individual. (*Hill v. Boston*, 122 Mass. 344; *Maximilian v. Mayor, etc.*, 62 N. Y. 160; Dillon on Mun. Corp. [4th ed.] § 965; *Trans. Co. v. Chicago*, 99 U. S. 635; *People ex rel. v. Bd. Suprs.*, 142 N. Y. 271.) A county, in caring for highways and bridges, performs a duty properly belonging to the towns within its limits; a town not being liable for defects in highways and bridges the county can incur no liability by the performance of this duty. (*Hill v. Suprs. Livingston Co.*, 12 N. Y. 52; *Barber v. Town of New Scotland*, 88 Hun, 522; *People ex rel. v. Town Auditors*, 74 N. Y. 310; *Martin v. Mayor, etc.*, 1 Hill, 545; *Lane v. Town of Hancock*, 142 N. Y. 510; *Hughes v. Charlemont*, 107 Mass. 414; *Mower v. Leicester*, 9 Mass. 247; *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541; *Chidsey v. Town of Cuntion*, 17 Conn. 475; *Reed v. Inhabitants of Belfast*, 20 Me. 346; *Eastman v. Meredith*, 36 N. H. 284; *Morey v. Town of Newfane*, 8 Barb. 645.) The bridge in question was in the control of the contractors, who alone are liable for the failure to keep it in repair. (Dillon on Mun. Corp. §§ 1028-1030; *Engel v. Eureka Club*, 137 N. Y. 100; *Storrs v. City of Utica*, 17 N. Y. 104; *McCafferty v. S. D. & P.*

M. R. R. Co., 61 N. Y. 178; *Nolan v. King*, 97 N. Y. 565; *Pack v. Mayor, etc.*, 8 N. Y. 222; *Blake v. Ferris*, 5 N. Y. 48; *Kelly v. Mayor, etc.*, 11 N. Y. 432; *Trans. Co. v. Chicago*, 99 U. S. 635.) This claim should be presented to the board of supervisors before an action can be maintained. (*Albrecht v. County of Queens*, 84 Hun, 399; *Erhard v. County of Kings*, 69 N. Y. S. R. 624; *Martin v. Suprs. of Greene Co.*, 29 N. Y. 645; *Brady v. Suprs. of N. Y.*, 10 N. Y. 260; *People ex rel. v. Suprs. of Madison Co.*, 51 N. Y. 442.)

GRAY, J. Plaintiff's intestate lost his life through the breaking down of a bridge over Newtown creek and this action was brought to recover damages of the defendants, the county of Queens and the city of Brooklyn, for their alleged negligence with respect to the condition of the bridge.

A bridge had long existed over Newtown creek, which was the boundary line between the counties of Kings and Queens, and, pursuant to an act passed in 1892, the boards of supervisors of these counties had made a contract for its reconstruction. Meanwhile, a temporary foot bridge, for the accommodation of foot passengers during the progress of the work, was erected and made use of by the public. The plaintiff alleges that this temporary bridge was insufficient, out of repair, inadequate for its purposes and not calculated to bear the strain to which it would be subjected and that the defendants were negligent in permitting its use by the public in that condition. The county of Kings, under chapter 954, Laws of 1895, became absorbed, on January 1st, 1896, into the city of Brooklyn; which was, therefore, made a defendant. The county of Queens, the other defendant, demurred to the complaint, for not stating facts sufficient to constitute a cause of action against it. The demurrer was sustained at the Special Term and at the Appellate Division of the Supreme Court, in the second judicial department; which latter court has certified the case to us, as involving a question of law which ought to be reviewed by this court. That question, broadly, is whether,

by any rule of law, as established in this state, a county may be held liable, at the suit of a private individual, who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable. The question is one of considerable interest and, beyond the general discussion, demands an interpretation of the provisions of the County Law of 1892, (Laws of 1892, chap. 686); the second section of which declares the county to be a municipal corporation. The provision is as follows: "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law." By the third section, it is provided that: "An action * * * to enforce any liability created, or duty enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the county." It is argued that the county, being thus declared a municipal corporation and being charged by law with the duty of maintaining the bridge, is made subject to those liabilities which it was understood the law attached to that class of corporations for breaches of duty. It is urged that as counties never were known, before this statute, as municipal corporations, the Legislature, in its enactment, must have intended that they should be treated as upon a par with cities, when engaged in similar transactions, and that this proposition should be sustained from the point of view of public interest. In considering the question before us, we must not fail to observe that the language of section three, above quoted, seems to import no further liability than that which was then existing. The only portion of that section which is material to the case is that which provides for an action "to recover damages for any injury to any property or rights for which it is liable." In other words, what the Legislature appears to have done was to provide that where the county *is* liable for an injury, the action shall be in the name

of the county. If, prior to the passage of the County Law, the county was not liable for such an injury, as was sustained in the present case, did it become so thereafter by implication from the language of the second section, as argued for the appellant, in the use of the words "municipal corporation," or by reason of the third section?

To a clear understanding of the question, it may be well to consider what was the legal status of counties of this state and then, incidentally, what is that of a municipal corporation proper, such as an incorporated city. The civil divisions of a state into counties had their origin in England; where, preceding the organization of the kingdom itself, they were, thereafter, continued from recognized necessities in government; as other countries had their departments, or their provinces. In such divisions, it was found that the purposes of local government and of the administration of justice were promoted. Differing from England in their origin, in this country they were first created by the Legislatures of the various colonies and, subsequently, by the states of the Union. They were invested with such corporate attributes as were essential to a proper performance of the duties of local government. They were, in effect, subdivisions of the governed territory, established for the more convenient administration of government and having such powers as were necessary to be exercised for the welfare, advantage and protection of the public within their boundaries. While in the People resided the sovereign right to declare the general mode of their government, it was the appropriate duty of their legislative body to so arrange the territory of the state into civil divisions and to so apportion among them governmental duties, as would best conduce to the advantage of its citizens.

By the common law of England, a county, though sometimes regarded as a *quasi* corporation, could not be subjected to a civil action for a breach of its corporate duty; unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it; but the only remedy for a breach of that duty was by presentment or indict-

ment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as the subject of a popular action and not of a private action. In *Russell v. The Men of Devon* (2 T. R. 667), which was an action by an individual against the inhabitants of a county for an injury sustained through the defective condition of a county bridge, it was held that they were not such a corporation, or *quasi* corporation, against whom such an action could be maintained. It was reasoned that, while the inhabitants of the county might be a corporation for some purposes, no statute had authorized such an action and that the action would be one against the public. The authority of that case, as settling the rule at common law that no civil action could be maintained for an individual injury, in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country. I may refer in particular to the case of *Bartlett v. Crozier* in this state (17 John. 439), and to the cases in Massachusetts of *Riddle v. Proprietors, etc.*, (7 Mass. 169), and *Mower v. Leicester* (9 id. 247), and to the very thorough discussion of the cases in England and in the United States, which will be found in *Hill v. City of Boston* (122 Mass. 344), and in chapter 23 of vol. 2 of Dillon's *Municipal Corporations*. I think it, however, sufficient to confine the present discussion to what the statutes and decisions of this state require us to hold upon the question.

In this state its division into counties, or sections, for the purposes of local government was but a continuance of a method, which, while a colony, it had adopted from England. By the Constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If under the common law counties could not be subjected to private actions, for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions; unless the common law, in that respect, has been changed by statute.

Where a principle of the common law has entered into our form of government, it is controlling, until by legislation, express in its terms, it is modified, or negatived by the substitution of a new declaration upon the subject. The only statute for which that could be claimed is the County Law of 1892, which, heretofore, I have referred to.

Having regard to the fact that counties were created such for the better and more convenient government of the state, both upon authority and upon principle, in the exercise of those political powers which appertain to local government and which are for the public benefit, they should be no more liable for damages resulting therefrom, at the suit of a private individual, than would be the state itself. The counties and towns of this state were always bodies corporate for certain purposes, having been endowed with capacities to purchase and to hold real and personal property and to make contracts in reference thereto. (R. S. part 1, art. 1, tit. 1, chaps. 11 and 12.) The corporate powers were of defined and limited extent and in all other respects which concern governmental duties, included among which was the conservation of highways, roads and bridges, they were merely divisions, organized for the convenient exercise of portions of the political power of the state. (*Lorillard v. Town of Monroe*, 11 N. Y. 392.) The common-law rule which rested the duty of caring for and repairing highways and bridges upon the counties did not obtain in this state. That duty was confided to the officers of towns; but special acts were passed from time to time, whereby the burden has been shifted so as to be imposed, either upon two or more towns, or upon the county, or upon both counties and towns. (*Hill v. Supervisors, etc.*, 12 N. Y. 52.) In the County Law of 1892, it was provided that where a bridge spans any of the navigable tide-waters of this state, (as in the present case), forming a boundary line between two counties, the expense of its maintenance is made an equal charge on the two counties in which the bridge is situated. (Sec. 68.) Whether the maintenance of highways and bridges is devolved as a duty upon the towns, or upon

the counties of the state, it must be regarded as a duty, in its nature, public and governmental. (*Lorillard v. Town of Monroe, supra.*) There is no distinction to be made between highways and bridges in the matter of the duty. A public bridge is a public highway. (Ang. on Highways, § 40.) Its maintenance is quite as much a governmental duty towards the public within the territory of the state, and the principle that the state holds its highways in trust for the public is applicable. (*Transportation Co. v. Chicago*, 99 U. S. 635.) This is especially true where a bridge is necessary to cross the navigable waters of the state; but it is true under all circumstances. In *People v. R. & S. R. R. Co.*, (15 Wend. 113, 134), it was said by SAVAGE, Ch. J.: "There can be no question, therefore, that the state legislature has the power to build bridges, where they shall be necessary for the convenience of its citizens. * * * It is the duty of the state governments to afford their citizens all the facilities of intercourse which are consistent with the interests of the community." To charge the duty of building and maintaining a bridge over navigable waters upon the boards of supervisors of counties, was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit and in its exercise they acted as the agents for the public at large. The state, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway and its performance might properly be delegated to the officers of the particular civil division. The corporate body of Queens county derived no especial advantage from it in its corporate capacity and, if that be true, it should not be liable for the negligent acts of the board of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be as exempt from a private action as would be the state itself. In *People ex rel. Keene v. Supervisors, etc.*, (142 N. Y. 271), we expressly held that the power conferred upon the counties of Kings and Queens with respect to this work was in the public interests and for the public benefit. As

lately as in the case of *Hughes v. County of Monroe*, (147 N. Y. 49), where it was sought to hold the defendant liable for injuries sustained by the plaintiff, while operating a steam mangle in the laundry of an insane asylum, the doctrine was, plainly, asserted of the non-liability of counties and of other municipal corporations for the acts of their officers, when engaged in the discharge of public duties and, to that extent, exercising acts of sovereignty.

This doctrine of non-liability, resting as it does upon the principle that the grant of power is to the county in its political character and as a means of the exercise of the sovereign power in measures of public interest and for the public benefit, is illustrated in various decisions of this court; where the question arose as to the liability of a city for corporate acts resulting, through a negligent performance, in injury to individuals.

With respect to such a municipal corporation proper as a city, the rule of law is well settled by frequent adjudications that the grant by the legislature of a city charter, authorizing and requiring a city to perform certain duties, renders it liable to a private action for neglect in their performance, when a county or town would not be so liable. A distinction exists between such a corporation, which is created by charter and is granted the power to own and to manage private property and is invested with particular franchises, and a municipal corporation, which is created for the purposes of state government and to exercise as one of its civil divisions, certain of its political powers. In the case of the former, its responsibility depends upon the nature of the powers exercised. NELSON, Ch. J., in *Bailey v. Mayor, etc.* (3 Hill, 531), discusses the powers of cities as municipal corporations; but the discussion is not without its usefulness to the present case.

He laid down the doctrine, which has been followed in subsequent decisions in this court, that a clear distinction exists between the powers which belong to a city as a municipal body. He observed that if they were "granted for public purposes exclusively, they belong to the corporate body in its

public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." This doctrine was reiterated in *Lloyd v. Mayor* (5 N. Y. 369), and in *Marmilian v. Mayor* (62 N. Y. p. 164). FOLGER, J., in the latter case, expounding the nature of the duties imposed upon a municipal corporation, said: "One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. * * * Where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents." The principle that a city, as a municipal corporation, is held to a strict liability to respond in damages at the suit of a private individual, for its negligence in the maintenance of its streets and other properties, was thus explained by SELDEN, J., in *Weet v. Brockport* (16 N. Y. 162, foot note): "The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking, on the part of the corporation, to perform with fidelity the duties which the charter imposes." The reasoning of these cases has its pertinency to the present case. The County Law of 1892, in denominating a county as a municipal corporation, specifies the purpose to be that of "exercising the powers and discharging the duties of local government and the administration of public affairs;" and

prior to the enactment it existed to perform just such governmental functions.

I think that the principle of our decision must necessarily be this: That as the counties of this state were bodies corporate for certain specific purposes, before the enactment of the County Law of 1892, now that they are declared thereby to be municipal corporations, their liability for corporate acts is no further enlarged than what may be clearly read in, or implied from, the statute. Their becoming municipal corporations in name imports no greater liability; because, by the third section of the law, their liability for injuries is confined by the language to that which was existing. The liability remains as it was, neither greater nor less. No new duty or burden has been imposed upon counties, in respect to the maintenance of bridges over navigable boundary streams; the duty, which always existed for public purposes and for the public benefit, is continued. The work of maintaining the bridge in question was properly charged upon the counties; because it could be more advantageously performed by them than by the towns. Towns, themselves, were not liable for damages arising from defective highways and bridges, until, by an act of the legislature in 1881, the liability which formerly rested upon the commissioners of highways was transferred to them. If it was necessary, in order that towns might be made liable in private actions, that there should be such legislation, it is as necessary, I think, that there should be some express legislation, in order to impose the liability upon a county which did not previously exist. The object of the County Law of 1892, in my judgment, in declaring the county a municipal corporation, was in order that it might be sued as a legal entity in such cases where, previously, actions were maintainable only in the name of the board of supervisors.

The appellant's counsel attacks the reasoning, which distinguishes between counties and chartered municipal corporations, in respect to their liability for corporate acts, as being unsubstantial and artificial, and he is able to cite us to some observations by text writers to that effect. The distinction is

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Dissenting opinion.

none the less real, however, because processes of reasoning might lead to the conclusion that the two classes of corporations should be placed upon a par in their attributes and incidents. The distinction rests upon established conditions of state government, which must endure until the Legislature expressly changes them. It has, not infrequently, been the case that statutes have so far modified some common-law condition, under which we were governed as a society, as to subject what remained of it to criticism similar to that now indulged in; but the rule is firmly established that the common law has been no further abrogated by a statute than is to be understood from the unmistakable import of the language used. *Bertles v. Nunan* (92 N. Y. 152), presents an interesting discussion in point under that head.

The conclusion I have reached, after a careful consideration of the subject, is that, in the work of construction of this bridge, the board of supervisors were executing a certain public duty, imposed upon them as the proper public agents in that particular civil division of the state, and that the county could not be subjected to a private action for injuries occurring in, or by reason of, the performance of the work. I do not think it is consonant with the reason of the rule of law, which concedes to the sovereign power in government an exemption from liability, that a private individual may have a right of action against those who have but exercised a lawful power which was vested in them by the legislative body for the public convenience and welfare and not for any private benefit of the corporate body.

The judgment appealed from should be affirmed, with costs.

BARTLETT and MARTIN, JJ. (dissenting). Where the duty to construct a highway or bridge is imposed by law upon a county we see no reason why, in case of negligence and consequent injury to the citizen, there should be any substantial difference as to liability between counties and cities as the former like the latter are now municipal corporations.

The county in the performance of this duty is clothed with a special power, not intrusted to it as a political division of the state in the exercise of the sovereign power for the benefit of all citizens, but strictly in the interest of the municipality.

All concur with GRAY, J., for affirmance, except BARTLETT and MARTIN, JJ., who dissent on ground stated in memorandum.

Judgment affirmed. _____

JOHN COURTNEY, as Sheriff of the County of Kings, and
EDWARD F. RICE, Respondents, v. THE EIGHTH WARD BANK
of Brooklyn, Appellant.

1. ATTACHMENT — LEVY — CERTIFIED COPY OF WARRANT. To effect a compliance with the provision of the statute (Code Civ. Pro. § 649, subd. 3), that property incapable of manual delivery may be attached "by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same," the paper left as a copy of the warrant must be duly certified by the sheriff having the custody of the original warrant, over his signature, to be a copy of the original warrant.

2. NON-COMPLIANCE WITH STATUTE. Leaving a paper, purporting to be a copy of a warrant of attachment and indorsed "copy," and having indorsed upon another fold a notice, signed by the sheriff, that certain property "is hereby attached by virtue of the inclosed warrant," does not satisfy the statutory requirement of a certified copy of the warrant.

Courtney v. Eighth Ward Bank, 14 Misc. Rep. 386, reversed.

(Argued December 15, 1897; decided January 11, 1898.)

APPEAL from an order of the General Term of the City Court of Brooklyn, entered November 27, 1895, reversing a judgment dismissing the complaint, entered upon the report of a referee and ordering a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Tunis G. Bergen for appellant. The statute giving the provisional remedy of attachment is in derogation of a common-law right and must be strictly construed. (*Penoyar v.*

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Points of counsel.

Kelsey, 150 N. Y. 77; Code Civ. Pro. §§ 635, 649; Drake on Attachment, § 83; *Eston v. Hanna*, 75 Mich. 222.) The statute requires that a certified copy of the warrant be served. (Code Civ. Pro. § 649; *Aitkens v. Kinnan*, 20 Wend. 250; *Greenvault v. F., etc., Bank*, 2 Doug. 502; *Buckley v. Lowry*, 2 Mich. 420; *Roelofson v. Hatch*, 3 Mich. 277; *Millar v. Babcock*, 29 Mich. 526; *Abrams v. Abram*, 38 Mich. 302; *Fairbanks v. Bennet*, 52 Mich. 61; *Anthony v. Wood*, 96 N. Y. 180.) The paper served on the defendant was not a certified copy. (Code Civ. Pro. §§ 932-962; 1 Greenl. on Ev. § 507; Stephen's Digest of Evid. 79; *Wilson v. Walker*, 3 Stew. [Ala.] 211.) It is not a question whether the defendant bank had sufficient evidence to determine whether the paper served was a copy of a warrant. It was for the sheriff to comply with each and every requisite of the statute in order to bring this property incapable of manual delivery in *custodia legis*. (*Hayden v. National Bank*, 130 N. Y. 150.)

Henry B. Closson for respondents. Any semblance of merit in the defendant's appeal depends upon its assumption that it is entitled to insist as against the plaintiffs, not upon a reasonable, but upon a strict and literal compliance by the sheriff with the provisions of the Attachment Act. The assumption is wholly erroneous. (*Penoyar v. Kelsey*, 150 N. Y. 77; *Warner v. F. Nat. Bank*, 115 N. Y. 251; *Hayden v. Nat. Bank*, 130 N. Y. 146; *O'Brien v. M. & T. F. Ins. Co.*, 56 N. Y. 52; *Thompson v. Eastburn*, 16 N. J. L. 100; *Saunders v. C. L. Ins. Co.*, 43 Miss. 583; *Bowes v. Shand*, 5 H. L. Cas. 395; Benj. on Sales, § 894.) But whether the section in question is to be construed strictly or liberally is immaterial, for the copy of the warrant served was duly "certified" by the sheriff, under any possible construction that can be given to that word. (*Gibson v. N. P. Bank*, 98 N. Y. 87.) A requirement in a statute regulating the mode of proceeding by a public officer, a strict compliance with which appears to the court unessential, is always held directory merely; *a fortiori*, one which it plainly appears the legisla-

ture itself considered immaterial. (Sedg. Stat. & Const. Law, 368; *Cunningham v. Cassidy*, 17 N. Y. 276.)

HAIGHT, J. This action was brought to recover the amount that the Cowles Engineering Company of New Jersey had on deposit with the defendant.

On the 25th day of August, 1893, an attachment was issued in an action brought by Edward F. Rice against the Cowles Engineering Company, which was delivered to the sheriff of Kings county with instructions to levy upon the balance owing that company by the defendant. On the 26th day of August the sheriff, or his deputy, went to the defendant's bank and delivered to the teller a paper purporting to be a copy of the warrant of attachment. It was folded in the usual form and had indorsed upon the back the title of the action, and underneath the title the words "Warrant of Attachment," then followed the name of the plaintiff's attorney, with his address, and after that the words "A Copy." Upon the reverse fold of the paper was indorsed the following: "To the Eighth Ward Bank. You are hereby notified that the deposit of the Cowles Engineering Company in your bank and the indebtedness owing it by your bank is hereby attached by virtue of the inclosed warrant. Dated August 26, '93. (Signed) John Courtney, sheriff, Wm. J. Cunningham, deputy." On the 12th day of September the cashier of the defendant certified that on the 26th day of August it was indebted to the Cowles Engineering Company in the sum of \$1,485.46. October 6th the attachment became merged in an execution issued upon the judgment, and on that day the sheriff demanded the payment to him by the bank of the money attached. This was refused, and thereupon this action was brought. The referee dismissed the plaintiffs' complaint, holding that the attachment was not properly levied. The General Term reversed the judgment upon questions of law and ordered a new trial.

The Code of Civil Procedure, section 649, subdivision three, provides that property incapable of manual delivery

may be attached "by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same."

In the case of *Penoyar v. Kelsey* (150 N. Y. 77), this court was called upon to construe section 636 of the Code, and it was then held that owing to the harsh nature of the remedy by attachment given by this section it should be construed in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be applied. This section had reference to the cases in which warrants of attachments were issued and not to the levy made under them. But in the case of *Hayden v. National Bank of the State of New York* (130 N. Y. 146) the provisions of section 649 were considered, and it was then held that in order to constitute a valid service there should be a substantial compliance with the provisions of the statute. Upon examination of the provisions of the Code it will be observed that the manner of service is carefully designated; a certified copy of the warrant must be delivered to the person holding the property sought to be levied upon. The original warrant of attachment must be delivered to the sheriff. Having it in his possession he is the officer upon whom devolves the duty of certifying as to the correctness of the copy. The delivery of the certified copy of the warrant must be accompanied with a notice showing the property attached. Neither of these requirements can be dispensed with and have a substantial compliance with the statute. The person upon whom the warrant is served is entitled to have a copy of the original warrant duly certified by the officer having the custody of the original paper, so that he may have official information as to the contents of the original, upon which he may rely and use as a shield against the claims of his creditor, whose property in his hands is sought to be attached.

We have carefully considered the facts presented and reluctantly have reached the conclusion that they do not constitute a valid levy of the attachment. It is true that upon the back of the attachment there is indorsed the words "A

copy," but these words standing alone prove nothing. Had the sheriff complied with the demands of the statute the defendant would have had a paper authenticated by the signature of a public officer, who, under the statute, was authorized to certify that the paper was a copy of an original warrant in his hands. The notice indorsed upon another fold of the paper does not aid the plaintiffs. It notifies the defendant that the deposit of the Cowles Engineering Company is attached "by virtue of the within warrant of attachment." The within paper does not purport to be an original warrant of attachment. The most that is claimed for it, or that it purports to be, is that it is a copy, and there is nothing in this notice from which we can draw the conclusion that it is a true copy, or is in any manner certified or authenticated.

The order of the General Term should be reversed and the judgment entered upon the report of the referee affirmed, with costs in all the courts.

All concur.

Order reversed, etc.

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WILLIAM J. DELANEY, as Receiver of the Property of THOMAS B. VALENTINE, Respondent, v. THOMAS B. VALENTINE, WILLIAM H. LOCKWOOD and ANN A. LOCKWOOD, Appellants.
No. 1.

WILLIAM J. DELANEY, as Receiver of the Property of THOMAS B. VALENTINE, Respondent, v. THOMAS B. VALENTINE, WILLIAM H. LOCKWOOD and ANN A. LOCKWOOD, Appellants.
No. 2.

WILLIAM J. DELANEY, as Receiver of the Property of THOMAS B. VALENTINE, Respondent, v. THOMAS B. VALENTINE, WILLIAM H. LOCKWOOD and ANN A. LOCKWOOD, Appellants.
No. 3.

1. DEBTOR AND CREDITOR — TRANSFERS NOT CONSTITUTING A GENERAL ASSIGNMENT. When a chattel mortgage, executed and delivered by a debtor to one of his creditors, and a transfer of business accounts to a third person, do not cover all the debtor's property and are only intended

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to secure the payment of debts of the mortgagee and certain other creditors mentioned therein, they are not within the statute which regulates the making of general assignments for the benefit of creditors, and prohibits preferences for more than one-third of the assigned estate (L. 1887, ch. 508).

2. **FRAUDULENT CONVEYANCES—CHATTEL MORTGAGE.** A chattel mortgage of a portion of his property, made by a debtor to secure some of his creditors, when his property is insufficient to pay all, executed and received in good faith, and without any fraudulent intent on the part of either of the parties, cannot properly be set aside as falling under the condemnation of the statute against fraudulent conveyances (2 R. S. 187, § 1).

3. **STATUTE OF PERSONAL USES.** The statute making transfers of personal property for the use of the grantor void as to creditors (2 R. S. 135, § 1), was intended to cover only passive trusts for the exclusive use of the grantor, or where the use of the grantor is the chief purpose, and has no application to trusts which are only incidental, and are expressed, or result, to the use of the grantor, after the exercise of the primary purpose, which is lawful.

4. **CHATTEL MORTGAGE NOT WITHIN STATUTE.** A chattel mortgage, given in good faith to secure the debt of the mortgagee, is not brought within the condemnation of the Statute of Personal Uses by the fact that it contains an incidental provision that any surplus, after payment of the debt, shall be returned to the mortgagor.

5. **MORTGAGE TO SECURE CREDITORS BESIDES MORTGAGEE.** Nor does the Statute of Personal Uses apply to such a mortgage, although given to secure the debts of other creditors, as well as that of the mortgagee.

6. **TRANSFER TO THIRD PERSON.** A debtor, whose property is insufficient to pay his debts in full, can make a valid sale or pledge of a portion of it to a third person to secure a part of his creditors.

7. **VALID TRANSFER.** A transfer, by a debtor whose property is insufficient to pay his debts in full, of a portion of his personal property to a third person to secure a part of his creditors, is not within the Statute of Personal Uses, when it contains no provision for returning any surplus; and if made in good faith, for the purpose of giving lawful preferences in the payment of honest debts, and so not fraudulent in fact, it is not fraudulent in law, but is valid as against other creditors.

8. **FRAUD IN LAW.** Fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it independently of the motive of the actor.

Delaney v. Valentine, 11 App. Div. 681, reversed.

(Argued December 15, 1897; decided January 11, 1898.)

APPEALS, by permission, from judgments of the Appellate Division of the Supreme Court in the third judicial department, entered December 17, 1896, which affirmed, respectively,

a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, in each of the above-entitled actions.

The plaintiff was duly appointed as receiver of the property of Thomas B. Valentine in proceedings supplementary to execution, and was authorized to commence and prosecute these actions. They were brought to set aside two chattel mortgages made by Thomas B. Valentine to Ann A. Lockwood, one under date of March 23, 1893, and the other on the fourteenth day of the following June; also to set aside a sale made under the last mortgage, and an assignment of accounts made by Valentine to William H. Lockwood. The ground upon which this relief was sought was that they were fraudulent as to the creditors represented by the plaintiff.

On the twenty-third of March, 1893, Valentine was indebted to various persons, among others, to the defendant Ann A. Lockwood, to whom he was indebted in the sum of seven thousand five hundred dollars. He was also indebted upon a note for twelve hundred dollars, indorsed by the defendant William H., and one of fifteen hundred dollars indorsed by Augusta H. Lockwood. For the purpose of securing the payment of these notes and his indebtedness to her, he, on that day, executed and delivered to Ann A. a chattel mortgage upon his stock of goods, which was in the store occupied by him and known as No. 468 Broadway, in the village of Saratoga Springs.

On the fourteenth of June Valentine was still indebted upon the claims mentioned, and also to certain other persons in various sums, amounting to about twenty-one hundred dollars. To secure the payment of all those debts he executed and delivered to Ann A. another chattel mortgage upon the property then in his store. The mortgage empowered her in default of payment to sell the mortgaged property, and out of the proceeds of the sale to pay the debts mentioned and interest, and the expenses of the sale, rendering the overplus, if any, to the mortgagor.

On the same day Valentine, by a written agreement, sold

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and transferred to William H. Lockwood certain accounts or choses in action as collateral security for the payment of a portion of the debts secured by the chattel mortgage to Ann A., and also to secure the debts of certain other creditors named therein. All the debts mentioned in the mortgages and agreement were honest debts owing by Valentine to the creditors mentioned. Immediately after the execution and delivery of the last chattel mortgage, the mortgagee took possession of the mortgaged property, duly advertised it to be sold thereon on the twentieth of the same month, and on that day it was sold at public auction and purchased by William H. Lockwood for the sum of fifty-five hundred dollars. The sale was fairly conducted, and the purchaser was the highest bidder. When the chattel mortgages and agreement were executed, Valentine owed other creditors not mentioned in either, including the creditors in whose interest these actions were brought. He also had at that time other property not included in the mortgages or agreement, but it was not sufficient in amount to pay any of his other creditors in full. By the execution and delivery of these instruments the judgment debtor intended to secure the payment of the debts specified in preference to his other debts, but did not in any other manner intend to hinder, delay or defraud any of his creditors. The defendants Ann A. and William H. Lockwood took the mortgages and transfer of accounts in good faith and for the sole purpose of securing the payment of the debts mentioned, and neither of them intended thereby to hinder, delay or defraud any of the other creditors of the debtor. When these conveyances were made the indebtedness of Valentine exceeded the value of his property, and they had the effect of preventing the creditors represented by the plaintiff from collecting the whole amount of their debts, as the property which remained was insufficient to pay them in full.

Upon these facts, which are admitted by both parties, the trial court held that the chattel mortgages to Ann A. and the transfer of accounts to William H. Lockwood were void, upon the ground that they created an unlawful trust for the

benefit of certain creditors who were not named as parties to either of those instruments, and also upon the ground that they created an unlawful trust for the benefit of Thomas B. Valentine. Thereupon the court directed a judgment against the defendants in each of the actions, adjudging the transfer and chattel mortgages void as to the creditors represented by the plaintiff, and required them to account for and pay to him all moneys received upon the accounts or for the property so mortgaged to be applied upon the judgments represented by him.

Edgar T. Brackett and Walter P. Butler for appellants. There is no question of actual fraud, or of intent to defraud in the case, the trial court having found expressly against either. It is the intent to delay, and not the fact of delaying, which the statute condemns, and the finding of delay, etc., is without effect and senseless. (Bishop on Insolv. Debtors [3d ed.], 273; *Commercial Bank v. Bolton*, 87 Hun, 547; *McNaney v. Hall*, 86 Hun, 415; *London v. Martin*, 79 Hun, 229; *Gomez v. Hugaman*, 84 Hun, 148.) The chattel mortgage of June 14, 1893, given by Valentine to Mrs. Lockwood, to secure debts due to her, and also various debts due other persons, and the assignment of accounts from Valentine to William H. Lockwood, were and are, and each of them was and is, a valid, legal instrument, and there is nothing appearing on the face of either of them condemning its legal character. (2 R. S. 135, § 1; *Curtis v. Leavitt*, 15 N. Y. 116; *Delaney v. Valentine*, 80 Hun, 476; *Dunham v. Whitehead*, 21 N. Y. 131; *Young v. Heermans*, 66 N. Y. 374; *Moore v. P. T. & S. Co.*, 133 N. Y. 144; *Brown v. Guthrie*, 110 N. Y. 435; *King v. Van Vleck*, 109 N. Y. 363; 101 N. Y. 504; *Ottman & Co. v. Cooper*, 81 Hun, 530; *Sloan v. Birdsall*, 58 Hun, 317; *Bier v. Kibbe*, 43 Hun, 174.) If the chattel mortgage of June 14, 1893, and the assignment of accounts, are held void for the reasons hereinbefore stated, as being to secure various debts, not only those owing to the mortgagee, Mrs. Lockwood, but also those of the other persons named, and as

requiring a return to the mortgagor of the surplus over the debts secured, and, therefore, as contravening the Statute of Personal Uses, they are void only to the extent that they transgress, and, therefore, are good as security for Mrs. Lockwood's (the mortgagee's) own claims that are secured by the mortgages. (*Boyd v. Dunlap*, 1 Johns. Ch. 478; *Friedman v. Hirsch*, 18 N. Y. Supp. 85; *Bigelow v. Ayrault*, 46 Barb. 143; *Van Wyck v. Baker*, 16 Hun, 169; *Pond v. Comstock*, 20 Hun, 493; *Clift v. Moses*, 75 Hun, 517; *Sloan v. Birdsell*, 58 Hun, 317.) The subsequent sale, in November, 1893, under execution against Valentine, of the goods covered by the chattel mortgage, as the property of Valentine, wholly purged the transaction of the giving of the chattel mortgage of any vice, and relieved the defendant Ann A. Lockwood from any liability to account for the proceeds of the property, even though the whole transaction of June 14, 1893, was illegal. (*Sands v. Codwise*, 4 Johns. 537; *Knower v. C. N. Bank*, 124 N. Y. 552; *Stephens v. Perrine*, 143 N. Y. 476; *Austin v. Bell*, 20 Johns. 442; *Rinchev v. Stryker*, 28 N. Y. 45; *Cramer v. Blood*, 57 Barb. 155; 48 N. Y. 684; *Murphy v. Briggs*, 89 N. Y. 446; *Bump on Fraud*. Conv. 473; *Tremaine v. Mortimer*, 128 N. Y. 1; *Bostwick v. Menck*, 40 N. Y. 383; Code Civ. Pro. § 2468; *Dubois v. Cassidy*, 75 N. Y. 298; *Masten v. Amerman*, 51 Hun, 244.)

A. W. Shepherd for respondent. This appeal is purely upon questions of law, and no review of the facts can be had by this court. (*Aldridge v. Aldridge*, 120 N. Y. 614; *Cook v. N. Y. E. R. R. Co.*, 144 N. Y. 117.) The instruments, and each of them, are void under section 1 of 2 Revised Statutes, 135, for the reason that they create a trust in favor of the mortgagor and assignor, and are, therefore, violative of the rights of creditors not parties thereto. (*Knapp v. McGowan*, 96 N. Y. 75; *Dillingham v. Flack*, 43 N. Y. S. R. 806; *Sutherland v. Bradner*, 116 N. Y. 410; *Karst v. Gane*, 136 N. Y. 321; *Delaney v. Valentine*, 80 Hun, 476; *Knower v. C. N. Bank*, 124 N. Y. 552; *Curtis v. Leavitt*, 15 N. Y. 9; *R. W. Co.*

v. *Fielding*, 101 N. Y. 504; *Billings v. Russell*, 101 N. Y. 233.) The fact that after the sale under the mortgages judgments were recovered by the defendant Ann A. Lockwood against Valentine, and the property which had been sold at the mortgage sale again sold as still the property of Thomas B. Valentine by virtue of said executions, alleged as a defense, is not only no defense, but an element, and a strong one, of the intent to hinder and delay creditors for which purpose the mortgages were given. (*Gouveneur v. Sanford*, 2 Hall, 624; *Van Alstyne v. Cook*, 25 N. Y. 489; *Steele v. Sturges*, 5 Abb. Pr. 442; *Field v. Sands*, 8 Bosw. 685; *Wiswall v. Sampson*, 14 How. [U. S.] 52; *Jermain v. Hendricks*, 100 N. Y. 279.)

MARTIN, J. In determining the validity of the judgments from which these appeals are taken, it must, at the outset, be assumed that all the transactions between the judgment debtor and the other defendants were based upon good and sufficient considerations, were entered into in good faith by all the parties, and that the mortgages and transfer of accounts were made, delivered and received with no intent upon the part of any of them to hinder, delay or defraud the creditors of the former. The learned trial court so found, and its findings as to those facts must be treated as conclusive.

One of the grounds upon which the plaintiff seeks to defeat these appeals is that the assignment and mortgages should be read together, and when thus considered they constitute a general assignment of all the debtor's property and are void, because not made in conformity with the statute relating to general assignments for the benefit of creditors, and because preferences were thereby created not allowed by that law. We think this contention cannot be sustained. It was expressly found that the judgment debtor had other property not included in either of the chattel mortgages, or in the transfer of accounts. Moreover, he made no general assignment. He simply executed and delivered to one creditor chattel mortgages to secure her own debt and the debts of others mentioned therein, and transferred his accounts to another person for the same general

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purpose. Obviously, these conveyances were not intended as a general assignment of all of his property for the benefit of his creditors. Nor was there any finding or proof that any such assignment was contemplated, or that the instruments given were a part of any scheme or plan which included a general assignment or that they were made with any intent to avoid the statute relating to that subject. On the contrary, the court expressly found that the only purpose of these conveyances was to secure the payment of the honest debts of the creditors named therein. A similar question arose in *Tompkins v. Hunter* (149 N. Y. 117, 121), where it was held that a sale or transfer of his property by a debtor in payment of the debts of a creditor, without making or contemplating a general assignment, was not within the provisions of the statute which regulates the making of general assignments for the benefit of creditors, and prohibits preferences for more than one-third of the assigned estate. The same doctrine was held in *Brown v. Guthrie* (110 N. Y. 435); *Manning v. Beck* (129 N. Y. 1); *C. N. Bank v. Seligman* (138 N. Y. 435, 445), and *Maass v. Falk* (146 N. Y. 34). These cases must be regarded as decisive of this question.

In discussing the remaining questions, we shall consider separately the chattel mortgages and the transfer of accounts, as they were between different parties and involve different principles. Such a consideration of these conveyances will avoid any confusion as to the facts relating to either and enable us to clearly understand the principles of law applicable to each. In examining the questions which relate to the mortgages, it will be unnecessary to refer to the mortgage of March twenty-third, as it was in effect superseded by that of June fourteenth, and, if the latter was valid, the rights of the parties were controlled by that alone.

The trial court having found that this mortgage was made and received in good faith, without any fraudulent intent on the part of either of the parties, it becomes obvious that, if the debtor possessed the right to mortgage a portion of his property to secure his honest debts to some of his creditors,

when it was insufficient to pay all, it could not be properly set aside as falling under the condemnation of the statute against fraudulent conveyances. (2 R. S. 137, § 1.) The existence of that right has been recently recognized by this court, where it was held that an insolvent debtor might sell or transfer the whole or any part of his property to one or more of his creditors in payment of or to secure their debts, when that was his honest purpose, although the effect would be to place his property beyond the reach of other creditors and render their debts uncollectible. (*Tompkins v. Hunter, supra.*) That case contains no new doctrine, but merely restates one that has long been established by the decisions of this court, as will be seen by an examination of the cases cited in the opinion. Any further discussion of the question is quite unnecessary.

The plaintiff also contends that this chattel mortgage was as to creditors void on its face, being in contravention of the statute against personal uses. (2 R. S. 135, § 1.) It contained a clause which provided that in case of default the mortgagee might take possession of and sell the mortgaged property, and out of the proceeds retain sufficient to pay the debts mentioned therein, with interest and expenses, "rendering the overplus, if any, unto said party of the first part, his executors, administrators and assigns." It is upon this clause that the plaintiff bases his claim that the mortgage was void under that statute. In examining that question it is perhaps proper to consider it, first, in its relation to the debt due the mortgagee, and, second, as to the debts which were secured to other creditors.

If this mortgage had been given to secure only the debt of the mortgagee, obviously it would not have fallen within the provisions of the statute which the plaintiff invokes. The primary purpose of such a conveyance is not to secure the use of the property to the mortgagor, but is to pay or secure his debt. The provision in the mortgage that the surplus, after the payment of the debts, should be returned to the mortgagor, was a mere incident of the conveyance, and in no way

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controls in determining the character of the transaction. If that statute was given the effect contended for, it would render void as to other creditors every mortgage or pledge of personal property to secure a debt. The statute was intended to cover only passive trusts for the exclusive use of the grantor, or where the use to the grantor is its chief purpose, and has no application to trusts which are only incidental, and are expressed, or result, to the use of the grantor, after the exercise of the primary purpose, which is lawful. Some of the earlier cases, perhaps, tend to sustain the plaintiff's contention, but they must be regarded as overruled by the later cases in this court, where a contrary doctrine has been held. (*Leitch v. Hollister*, 4 N. Y. 211; *Curtis v. Leavitt*, 15 N. Y. 9; *Dunham v. Whitehead*, 21 N. Y. 131; *Van Buskirk v. Warren*, 2 Keyes, 119; *Knapp v. McGowan*, 96 N. Y. 75.) In the *Leitch* case it was decided that the provisions of that statute had no application where an assignment was to the creditors themselves for the purpose of securing their demands, whatever its form, as it was in legal effect only a mortgage, and created a specific lien upon the property assigned. In *Curtis v. Leavitt* it was expressly held that that statute had no application to mortgages, trusts or other instruments created to raise money or secure a creditor. In the *Dunham* case it was decided that an assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of a debt, with a provision for a return of the surplus, was in effect a mortgage and not void under the Statute of Personal Uses. In *Van Buskirk v. Warren* this court determined that an assignment made directly to certain creditors, for the purpose of securing their demands, was not within that statute. The *Knapp* case was to the effect that a debtor, whether solvent or insolvent, might, if acting in good faith, mortgage a portion or the whole of his property to secure existing claims against him. The doctrine of these cases is conclusive upon the question, and it follows that the Statute of Personal Uses had no application to the mortgage under consideration, so far, at least, as the transfer was directly to the creditor.

This leads us to consider whether the fact that this mortgage was given to secure other creditors also in any way changes the situation. How the effect of that statute can differ in the two cases is not apparent. The reasons which have been given for holding that it has no application to a mortgage to secure the debt of a mortgagee apply with equal force to a mortgage given to secure the mortgagee and other creditors as well. The validity of such a mortgage is fully sustained by the decisions of this court. (*Royer Wheel Co. v. Fielding*, 101 N. Y. 504; *Brown v. Guthrie*, 110 N. Y. 435; *Hine v. Bowe*, 114 N. Y. 350; *Ottman v. Cooper*, 81 Hun, 530; *S. C.*, 151 N. Y. 652.) In the *Royer Wheel Co.* case it was held not only that the Assignment Act did not apply to a specific assignment by a debtor for the benefit of one or a portion of his creditors, but also that a mortgage given to secure a portion of his creditors was valid, and was not rendered void by a provision requiring any surplus to be paid over to the mortgagor. In *Brown v. Guthrie* the defendant and M. entered into a contract by which it was agreed that, in consideration of M.'s executing to the defendant his notes for twenty-four hundred dollars, secured by a chattel mortgage, the defendant would cancel certain notes held by him against M., loan him a sum of money, and pay his debts to such creditors as M. should thereafter designate, to an amount mentioned. This agreement was carried into effect. Its validity was subsequently challenged, and this court decided that the transaction was not fraudulent as a matter of law; that it could not be considered as a general assignment by an insolvent debtor, and that it was valid as against creditors. In the *Hine* case a firm executed to the plaintiff a bill of sale of the firm property, and the plaintiff executed an instrument in return by which he agreed to cancel his indebtedness against the defendant and pay other debts of the firm not exceeding a sum named, and it was held that the agreement did not constitute an assignment, but was a sale, and that as the sale was made in good faith it was valid and not affected by the fact that the vendors reserved the right to direct upon what debts the surplus should be paid. In the

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Ottman case an action was brought by a judgment creditor to set aside three chattel mortgages given by their debtor to the defendants, upon the ground that they were fraudulent and void as against creditors whose indebtedness existed when the mortgages were given. One of the mortgages was to trustees to secure the indebtedness of a third person. The trial court found that the trust mortgage was executed in good faith, and the General Term held that none of the mortgages was fraudulent either in law or in fact, and that the trustees were entitled to be protected. The prevailing opinion of the General Term in that case was adopted by this court. The principle of those cases renders it manifest that the mortgage was valid and that the courts below improperly set it aside.

This leaves for consideration the validity of the transfer of accounts by the debtor to William H. Lockwood. In determining this question it must be assumed that the accounts were sold, not to secure any debt of Lockwood's, but as collateral security for honest debts owing by the debtor to the creditors named. Thus, the point upon which its validity turns is whether a debtor, whose property is insufficient to pay his debts in full, can make a valid sale or pledge of a portion of it to a third person to secure a part of his creditors. It is obvious that this transfer did not fall under the condemnation of the statute against personal uses, as it was absolute and contained no provision for the benefit of the person making it; nor, under the findings of the court, can it be said to have been in violation of the statute against fraudulent conveyances, as it was not made with an intent to hinder, delay or defraud creditors. Under the authorities already cited, this transfer, if it had been made directly to the creditors, or to one creditor for the benefit of himself and others, would have been valid. So we are called upon to determine whether the fact that it was to a third person, instead of to one of the creditors, renders it invalid. The transaction was in effect a sale by the debtor of his choses in action as collateral security for the payment of certain of his creditors. If the property transferred exceeded in value the

amount of debts it was given to secure, it might have been reached by other creditors. In the absence of a bankrupt law, a debtor is not deprived of the control of his property by mere insolvency. His debts are only personal obligations, and so long as he acts in good faith and in a manner not prohibited by law, he may deal with it as he sees fit. But it is said that in this case there was fraud in law although there was none in fact. Evidently there can be no fraud in law or in fact without a breach of some legal or equitable duty. It is true there may be fraud in law where no actual fraudulent intent is proved, but in such cases the law presumes fraud, because it is a necessary consequence of some established act. In other words, fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it independently of the motive of the actor. This principle is illustrated where an insolvent debtor makes a gift of his property. In such a case the property may be reached by creditors because it constitutes a fund which justly belongs to them, while the donee has no equitable right to it. Any voluntary transfer by a debtor which deprives his creditors of a fund that equitably belongs to them is necessarily a fraud upon their rights, and, therefore, fraud is implied, which is sometimes denominated fraud in law. The case here is different. Here one creditor had no superior right over another unless the debtor saw fit to confer it upon him. As he might, however, prefer one creditor to another, and as in this case that was the purpose of the debtor, his purpose, at least, was lawful. But it is said that the means employed to carry it into effect were unlawful and the transaction, consequently, void. If the means were actually illegal, the result claimed might follow. But our attention has been called to no statute or principle of common law forbidding such a transfer. Surely it was not condemned by the statute against personal uses, nor, as its purpose was an honest one, by that relating to fraudulent conveyances. We find no principle upon which the claim of the plaintiff can be upheld. Suppose creditors were absent, can it be that a debtor could not deliver property

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to a third person to secure his debts to such absent creditors? We think not. If he could, then obviously this transfer was valid. There could be no more fraud in this case than in the one supposed. If one would be valid, we perceive no reason why the other would be invalid.

But the plaintiff claims that the authorities establish a contrary doctrine, and cites the cases of *Goodrich v. Downs* (6 Hill, 438); *Barney v. Griffin* (2 N. Y. 365); *Collomb v. Caldwell* (16 N. Y. 486); *Sutherland v. Bradner* (116 N. Y. 410) and other cases of similar import to sustain that claim. When these cases are examined, it will be discovered that they were decided upon principles which have no application here. In the *Goodrich* case there was a general assignment in trust for the benefit of a portion of the creditors of the debtor, with a provision that, after the payment of their debts, the surplus should be returned to the assignor. So in the *Barney* case, there was a transfer by an insolvent debtor of all his property in trust to pay certain specified creditors, and then to reconvey to the debtor, without making any provision for his other creditors. The *Collomb* case was also one where there was an assignment in trust to pay certain debts, with a provision reserving the surplus to the assignors. In the *Sutherland* case there was a preferential assignment in trust for the payment of part of the creditors, with a remainder to the assignor. It is to be observed that in all of these cases there was an express provision by which the debtor reserved to himself, or for his own benefit, a surplus of the property assigned, and it was upon that ground that those decisions were founded. The fraud in those cases lay in the fact that the property exceeded, or was by the parties supposed to exceed, the amount of preferred debts, and a surplus was contemplated, which should be reconveyed to the assignor without payment of his other creditors. It was the intent to place that portion of his property in the hands of another in trust for himself, to the exclusion of creditors, that was fraudulent. As his property was a fund out of which his creditors were entitled to be paid, it was held that an attempt

to assign a portion of it in trust to pay only a part of his debts and then to convey the remainder to himself was void, because it disclosed a fraudulent motive upon his part to deprive his other creditors of any recourse to such surplus or, at least, to delay them in reaching it, and, therefore, was in direct contravention of the statute against fraudulent conveyances. (*Doremus v. Lewis*, 8 Barb. 124.) We think those cases are clearly distinguishable from this, and serve as another illustration of what is commonly termed fraud in law. In all of these cases the act of the debtor was one which disclosed an actual fraudulent intent within the statute against fraudulent conveyances, or fraud was the necessary result of the acts proved. In this transfer there was no provision for returning any surplus. It was not an assignment for the benefit of creditors, but was a mere transfer of property to a third person by the debtor as security for certain of his debts. We are of the opinion that the transfer of accounts cannot be said to be fraudulent in law, and, as it was found not to have been fraudulent in fact, it was valid, and the court was not justified in setting it aside.

It may be said that if this transfer is sustained it will open the door for fraudulent transfers by insolvent debtors. The answer is that the door would be opened no wider in such a case than it has already been in cases where transfers are directly to one creditor to secure a debt of his own and the debts of others. In either case transfers may be fraudulently made. But when they are, they may be set aside as fraudulent in fact. Yet when made in good faith, for an honest purpose, we think they cannot be held fraudulent in law.

There are several other questions which were presented by the appellants upon the argument, but this disposition of those already discussed renders unnecessary the consideration of any of the other questions.

The judgments of the Appellate Division and Special Term should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgments reversed.

CHARLES BEARDSLEY, Respondent, v. GEORGE H. COOK,
Appellant.

BUILDING CONTRACT — RIGHTS OF OWNER AND SUB-CONTRACTOR, UNDER ORDER FROM CONTRACTOR. If, after the owner of a building in course of construction under a contract payable in installments has accepted an order drawn by the contractor in favor of a sub-contractor, payable out of the final installment, the contractor fails to perform by the stipulated date, and the owner then makes a supplemental contract with him for performance by a new date and he again fails to perform, and the owner, having the amount of the final installment in his hands unpaid, makes payments to the contractor not due under the contract, and finally completes the work himself, as provided by the contract, he is not entitled to deduct such payments from the fund applicable to the payment of the sub-contractor for material furnished and used, although entitled to deduct from the fund the expense of completing the work.

Beardsley v. Cook, 89 Hun, 151, affirmed.

(Submitted December 16, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department entered August 1, 1895, affirming a judgment in favor of plaintiff, entered upon a verdict directed by the court.

This action was brought to recover the amount alleged to be due upon the following order:

“ Mr. GEORGE H. COOK,

No. 50 Broadway, N. Y. City :

“ Retain and pay to Charles Beardsley of Poughkeepsie, N. Y., from the last payment to be made by you to us on account of our contract for building houses in Dean street, Brooklyn, the sum of eleven hundred and seventy-five (\$1,175) dollars according to the terms of our contract with Mr. Beardsley.

DAVIS & FAY.

“ Dated NEW YORK, December 11, 1890.”

The facts, so far as material, are stated in the opinion.

John H. Clapp for appellant. The most that plaintiff can possibly get in this case is a judgment for the balance remain-

ing in the hands of the defendant. (*Beardsley v. Cook*, 143 N. Y. 150.)

Henry Bacon for respondent. The denial of the motion to dismiss the complaint presents no question for review in this court. (Code Civ. Pro. § 995; *Bissell v. Studley*, 3 Keyes, 213; *Briggs v. Waldron*, 83 N. Y. 582; *Schwinger v. Raymond*, 105 N. Y. 648; *Foulke v. Thalmessinger*, 1 App. Div. 598.) The defendant having moved that judgment be directed for the plaintiff waived all question of his liability to pay plaintiff something, and any question which might otherwise have arisen upon the plaintiff's right to maintain this action. (*Ormes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockroft*, 90 N. Y. 649; *Dauscha v. Brower*, 72 Hun, 221; *O'Neil v. H. V. I. Co.*, 74 Hun, 163.) Both parties having requested the court to direct a verdict, the amount of damages, as directed, is conclusive. (*Daly v. Wise*, 132 N. Y. 306; *Kirtz v. Peck*, 113 N. Y. 222; *Provost v. McEncroe*, 102 N. Y. 650; *T. L. Co. v. Holbert*, 5 App. Div. 559.) The rule of damages adopted by the court was the correct one. (*Loverly v. Steward*, 25 N. Y. 239; *Risley v. Smith*, 64 N. Y. 576; *Kingsley v. City of Brooklyn*, 78 N. Y. 200; *Brill v. Tuttle*, 81 N. Y. 454; *Gibson v. Lenune*, 94 N. Y. 183; *Home Bank v. Drumgoole*, 109 N. Y. 63; *Lauer v. Dunn*, 115 N. Y. 405; *Stevens v. Ogden*, 130 N. Y. 182; *Crouch v. Muller*, 141 N. Y. 495; *Beardsley v. Cook*, 143 N. Y. 143; *H. B. Co. v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 390; *Newman v. Levy*, 84 Hun, 478.) The final payment on the contract of Davis & Fay was due before this suit was commenced. Payment of the value of the materials furnished by plaintiff and used in the defendant's buildings became immediately thereafter due upon their accepted order, and to that amount the recovery was restricted. (*Nolan v. Whitney*, 88 N. Y. 648; *Flaherty v. Miner*, 123 N. Y. 382; *Crouch v. Gutmann*, 134 N. Y. 45.) The defendant having elected to proceed and complete the buildings under the contract with Davis & Fay, the architect's certificate was not

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required in order to entitle plaintiff to recover. (*Kingsley v. City of Brooklyn*, 78 N. Y. 200; *Crouch v. Gutmann*, 134 N. Y. 45; *Weeks v. O'Brien*, 141 N. Y. 199.) Plaintiff is entitled to recover the amount due to him out of the last payment after deducting only costs of completion by defendant. (*Murphy v. Buckman*, 66 N. Y. 297; *Van Clief v. Van Vechten*, 130 N. Y. 571; *Ogden v. Alexander*, 140 N. Y. 356.)

BARTLETT, J. Davis and Fay, contractors, on the 1st day of August, 1890, entered into a written agreement with the defendant Cook to erect two buildings for him on Dean street in the city of Brooklyn, to be completed on the 1st day of January, 1891, at a total cost of \$6,381, payable in seven payments, the last amounting to \$2,181.

Thereupon the contractors entered into an agreement with the plaintiff Beardsley to furnish them sash, blinds, glass and other trim to be placed in the buildings, aggregating in value \$1,175.

In order to secure plaintiff, the contractors gave him an order upon the defendant for \$1,175, payable out of the last payment to be made them. This order was duly accepted by the defendant.

The original contract between defendant and the builders provided that, if the latter refused or neglected to perform, the defendant could complete the work and deduct the expense from the amount of the contract.

It is admitted that the contractors failed to perform and the defendant completed the work at an expense of \$677.17.

The course taken by this case at the trial only renders it necessary to determine under the proofs the balance of the last payment remaining in the defendant's hands after deducting the sum expended by him in completing the buildings.

At the close of the plaintiff's case, the defendant, introducing no evidence, moved that a verdict be directed for the plaintiff for the sum of \$313.08.

The plaintiff moved for a direction of verdict in his favor

for the sum of \$1,000, goods furnished the contractors, and \$213 of interest, making a total of \$1,213. The court thereupon directed a verdict in favor of plaintiff for the latter sum.

There was no motion for a new trial. A motion was made to dismiss the complaint, which was denied, and no exception taken.

It appears that after Davis and Fay failed to perform their contract, the defendant entered into a supplemental contract on February 2nd, 1891, with them, wherein he agreed to advance a certain sum, and they were to finish all outside work; all doors and sashes were to be hung in place, locks on and plumbing inclosed by February 10th, 1891, and in case they failed to perform, plaintiff was at liberty to complete the work.

The work continued under this arrangement until March 19th, when the defendant was obliged to complete the buildings.

It is undisputed that on the 18th of February, 1891, the defendant had completed the sixth payment under the contract, and had paid \$50 in excess, so that at the time the contractors had finally failed in performance, February 10th, 1891, the defendant had unpaid in his possession, substantially the total amount of the seventh or final payment of \$2,181.

It is also a very material fact that this supplemental contract in no way concerned the plaintiff, as it was a new arrangement between defendant and the contractors.

It also appears that notwithstanding the existence of plaintiff's accepted order on defendant, he continued to make payments to the contractors between February 28th and March 14th, 1891, aggregating a little more than \$1,100, and which amounts were not due under the terms of the original contract.

It is by adding this amount to the sum actually expended by the defendant in completing the work that shows a balance of only \$313.08 unexpended in defendant's possession and applicable to the payment of plaintiff's order.

On the contrary, the non-allowance of these unauthorized and undue payments shows a balance in defendant's hands of

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the final payment, after deducting the amount expended by him in completing the work, of \$1,503.83, or more than enough to pay the directed verdict.

The present appeal is from a judgment of affirmance by the General Term after a second trial.

The case was before this court on an appeal from a judgment of the General Term affirming a judgment at the first trial in favor of the plaintiff at Special Term.

This court reversed the judgment and ordered a new trial on the ground that the trial judge refused to find that the contractors failed to perform their contract, and also refused to find the amount expended by the defendant in completing the buildings, and held that plaintiff could only recover the balance in defendant's hands after he had been reimbursed the amount expended by him in completing the work. (143 N. Y. 143.)

At the second trial this proof was supplied.

We are of opinion that the payments made to the contractors between February 28th and March 14th, 1891, by the defendant, as already alluded to, were unauthorized and not binding upon the plaintiff.

It follows that a proper disposition was made of the case by the trial judge.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

CHARLES BLOOM, Respondent, v. THE P. COX SHOE MANUFACTURING COMPANY, Appellant.

1. CONTRACT OF EMPLOYMENT — MEANING OF "TRAVELING SALESMAN" — EVIDENCE OF CUSTOM. When, on the trial of an action for breach of a written contract of employment as a traveling salesman, both parties treat the instrument as indefinite and needing explanation by extrinsic facts, and each resorts to proof of a custom in the trade construing the words "traveling salesman," it is proper for the court to leave to the jury the question as to the meaning of the controverted words, in the light of any custom that, in their judgment, may have been established.

2. CONVERSATIONS LEADING UP TO CONTRACT. When, in such an action, a question is litigated on both sides and without objection, as to conversations between the parties leading up to the written contract, concerning the duties to be performed thereunder, the question may properly be submitted to the jury.

3. SMALL SALES BY EMPLOYEE. If, in an action for breach of a contract of employment as a traveling salesman, the employer contends that the employee's sales were so small in comparison with his salary that he must be regarded incompetent as a salesman, it is proper for the court to instruct the jury that if the employee honestly endeavored to make sales and did not succeed, it was one of the risks the employer took in selling goods over the country.

Bloom v. P. Cox Shoe Mfg. Co., 88 Hun, 611, affirmed.

(Submitted December 16, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department, entered December 20, 1894, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Jonathan C. Ross for appellant. The verdict for the plaintiff is unsupported by the evidence. (*People ex rel. v. Martin*, 142 N. Y. 352; *Hudson v. R., W. & O. R. R. Co.*, 145 N. Y. 408; *Matter of Harriot*, 145 N. Y. 540.) An error in receiving incompetent evidence if properly excepted to, can only be disregarded when it can be seen that it did no harm. (*Foote v. Beecher*, 78 N. Y. 155; *Carroll v. Deimel*, 95 N. Y. 252.) The court erred in charging the jury that it could consider as a question of fact whether the plaintiff declined to sell in New York. (*Storey v. Brennan*, 15 N. Y. 524; *Palmer v. Kelly*, 56 N. Y. 637; *Holmes v. Jones*, 121 N. Y. 461; *Harris v. Wilson*, 1 Wend. 511; *Gale v. Wells*, 12 Barb. 84; *Small v. Smith*, 1 Den. 583; *Thalheimer v. Lamont*, 9 N. Y. S. R. 439; *Rouse v. Lewis*, 2 Keyes, 352; *Cleveland v. N. J. S. Co.*, 89 N. Y. 627; *Greene v. White*, 37 N. Y. 405.)

Joseph C. Rosenbaum for respondent. The verdict is supported by evidence on behalf of plaintiff and is not the sub-

ject of review in this court. (*Duryea v. Vosburgh*, 121 N. Y. 57; *Wicks v. Thompson*, 129 N. Y. 634; *Schwinger v. Raymond*, 105 N. Y. 648.) It is a question of fact whether or not the plaintiff was bound to sell goods in the city of New York under his agreement, and the jury found for the plaintiff. As defendant did not move for the direction of a verdict at the close of the case, he cannot now claim that the facts did not warrant a submission to the jury or that the verdict was against the weight of evidence. (*Bennett v. Levi*, 46 N. Y. S. R. 754.)

HAIGHT, J. The plaintiff sues the defendant corporation for breach of a written contract of service.

On the face of the contract defendant employed the plaintiff as traveling salesman for the year 1892, at an annual salary of \$1,800 per annum and expenses.

The plaintiff alleges performance and the defendant avers breach of the contract on his part.

The fact is that the defendant discharged the plaintiff on the 24th day of June, 1892, for the reason that he refused to drum for trade in the cities of New York and Brooklyn.

The question litigated at the trial was the meaning to be given to the words "traveling salesman," the plaintiff contending that as the principal business office of the defendant was in the city of New York, the term "traveling salesman" implied the sale of goods by him outside of the cities of New York and Brooklyn.

The defendant insisted that the contract obligated plaintiff to sell goods wherever they might direct him to go in the United States.

The course of the trial was such that both parties treated the written instrument as indefinite and needing explanation by extrinsic facts.

Evidence was given on both sides as to the alleged custom in the trade of construing the words "traveling salesman."

The learned trial judge, in his charge to the jury, said substantially that as each party had resorted to proof of custom,

he should leave the question to the jury as to the meaning of the controverted words, in the light of any custom that might have been established in their judgment.

There was also another question litigated on both sides and without objection, as to conversations between the plaintiff and the representatives of the defendant, leading up to the written contract.

On the part of the plaintiff, he testifies that he expressly stated that he would not undertake to sell goods in the city of New York and the vicinity, as he was totally unacquainted with that territory and his traveling had been confined to the south and west.

The defendant introduced evidence to the effect that plaintiff was informed that if he signed this contract he would be expected to sell goods in the city of New York and vicinity.

That question was also submitted to the jury.

The learned General Term, in a majority opinion, held that the questions of fact were properly submitted to the jury, and as they had found the contract to be, so it was.

The dissenting opinion seems to rest entirely upon the ground that plaintiff's sales were so small in comparison to the salary that he received, that he must be regarded incompetent as a salesman.

The learned trial judge informed the jury that if plaintiff honestly endeavored to make sales and did not succeed, it was one of the risks the employers took in selling goods over the country.

The judgment should be affirmed.

All concur.

Judgment affirmed, with costs.

ELIAS C. BENEDICT et al., as Executors of EDWIN BOOTH, Deceased, Appellants, v. GEORGE T. ARNOUX, Defendant, and JOSEPH CAMPBELL, as Executor, and EMMA CAMPBELL and MARTHA CAMPBELL, as Executrices of WILLIAM CAMPBELL, Deceased, and HANNAH CAMPBELL, Respondents, Impleaded with Others.

1. APPEAL — REVERSAL BY APPELLATE DIVISION ON FACTS — REVIEW. The power of the Appellate Division to reverse upon the facts, after a trial by the court or a referee, is limited to cases in which the findings are unsupported by testimony, or are against the weight of evidence. Where the findings are in accordance with the conceded facts or the uncontroverted testimony, the Appellate Division is not authorized to reverse upon the facts; and, if it does, a question of law is presented which the Court of Appeals may properly review.

2. POWERS OF APPELLATE DIVISION — REVERSAL — NEW TRIAL — FINAL JUDGMENT. In exercising the power conferred upon it to reverse or affirm, wholly or partly, or to modify, the judgment appealed from, and to grant a new trial if necessary or proper (Code Civ. Pro. § 1817), and to grant to either party the judgment which the facts warrant (§ 1022), the Appellate Division, on reversing a judgment, must grant a new trial, and cannot properly render a final judgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to judgment. This rule applies to actions in equity as well as to actions at law.

3. PRINCIPAL AND AGENT — WHEN AGENT'S KNOWLEDGE NOT IMPUTABLE TO PRINCIPAL. When an agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, the presumption that he has disclosed all the facts that have come to his knowledge does not prevail, and his knowledge is not imputable to his principal.

4. TESTAMENTARY POWER OF SALE — IMPROPER EXERCISE OF, BY EXECUTORS, PROMOTED BY AGENT OF ANOTHER, FOR HIS OWN BENEFIT — PRINCIPAL NOT CHARGEABLE WITH CONSTRUCTIVE KNOWLEDGE. If a power given by a will to the executors is that of sale and does not include a power to mortgage, and an agent, holding, in his own right, a judgment against the estate, which he is interested in having paid, and having in his hands money of his principal for investment, arranges with the executors that they shall deed land of the estate to a third party, for the purpose of having it mortgaged by the grantee to the principal, and thus obtain the principal's money and turn it over to the executors for the benefit of the estate and of the agent, and the arrangement is carried out, the principal,

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f 163 845

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having no actual knowledge of the arrangement, is not constructively chargeable with the agent's knowledge, even if the arrangement constitutes a scheme to evade the will and renders the deed a mortgage; and the principal is not precluded thereby from enforcing the mortgage executed to him by the grantee of the executors' deed, where the latter instrument, as recorded, is upon its face an absolute deed, for a full consideration, and apparently within the power conferred by the will.

Benedict v. Arnoux, 7 App. Div. 1, reversed.

(Argued December 10, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1896, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term, and awarding judgment absolute in favor of the defendants Campbell.

The nature of the action and the facts, so far as material, are stated in the opinion.

John E. Parsons for appellants. The sale and conveyance to George T. Arnoux was deemed by the executors to be in the interest of the estate. It was absolute in terms, complied with the will, and came within the power which the will conferred upon the executors. (*M. L. Ins. Co. v. Woods*, 121 N. Y. 302; *Rose v. Hatch*, 125 N. Y. 427; *Harrington v. E. C. S. Bank*, 101 N. Y. 257; *In re Heroy*, 67 Hun, 13.) The use of the \$16,500 in the payment of taxes, judgments against the estate for which the mortgaged property could be sold, and in the Ninety-eighth street houses, came within the authority which the will conferred upon the executors. (*Collison v. Lister*, 20 Beav. 356.) The judgment obtained by the Chemical Bank and assigned to W. H. Arnoux was entitled to priority in payment by the executors. For it the real estate could be sold in proceedings in the Surrogate's Court. (Code Civ. Pro. §§ 763, 1210; *Nichols v. Chapman*, 9 Wend. 452; *In re Dunn*, 5 Redf. 27; *In re Clark*, 5 Dem. 377.) The sale having been made under a valid power to sell, the title of the purchaser and of his mortgagee can only be impeached by showing one of two things: (1) That a sum of

money was not actually paid by the purchaser; (2) that it was not paid by him in good faith. (1 R. S. 730, § 66; *Field v. Schiefflin*, 7 Johns. Ch. 150; *Kirsch v. Tozier*, 143 N. Y. 395.) The transaction is to be upheld on the assumption of the respondents, *i. e.*, that it was a mortgage and not a sale. A power to sell may include a power to mortgage. (Sugden on Powers [8th ed.], 425; 2 Kent's Com. [11th ed.] 345, 381; Lewin on Trusts, 426; 2 Perry on Trusts [3d ed.], 414, § 768; Redf. on Wills, 549; *Brown v. F. L. & T. Co.*, 51 Hun, 386; 117 N. Y. 266; *A. F. Ins. Co. v. Bay*, 4 N. Y. 19; *Williams v. Woodard*, 2 Wend. 492; *Bloomer v. Waldron*, 3 Hill, 361; *Waldron v. McComb*, 1 Hill, 111; *Rogers v. Rogers*, 111 N. Y. 228; *Ball v. Harris*, 4 M. & C. 264; *In re Jones*, 59 L. J. Ch. 31; *Metcalf v. Hutchinson*, L. R. [1 Ch. Div.] 594; *Lobenthal v. Raleigh*, 36 N. J. Eq. 172.)

Henry B. Johnson for respondents. The deed and conveyance to George T. Arnoux, and the transaction upon it, was not a valid exercise of the power of sale conferred by this will. (*In re Heroy*, 67 Hun, 13; *Russell v. Russell*, 36 N. Y. 581; *Scholle v. Scholle*, 113 N. Y. 261.) The proceeds of this transaction were not used for the benefit of the estate. (*Loring v. Brodie*, 134 Mass. 453; *Adair v. Brimmer*, 74 N. Y. 539; *Deobold v. Oppermann*, 111 N. Y. 531.) Booth, plaintiffs' testator, was not a *bona fide* holder of the mortgage for value and without notice, and plaintiffs cannot take advantage of the provision of the statute, 1 R. S. 730, § 66. (*Griffith v. Griffith*, Hoff. Ch. 153; *Westervelt v. Hall*, 2 Sandf. Ch. 98; *Bank for Savings v. Frank*, 56 How. Pr. 403; *Slattery v. Schwannecke*, 118 N. Y. 543; *Champlin v. Haight*, 10 Paige, 274; *Moore v. A. L. & T. Co.*, 115 N. Y. 65.) The transaction was a mortgaging of the estate's property and not a sale. (*Allen v. De Witt*, 3 N. Y. 276.) A power of sale gives executors no power to mortgage. (*Bloomer v. Waldron*, 3 Hill, 361; *A. F. Ins. Co. v. Bay*, 4 N. Y. 9; 2 Perry on Trusts, §§ 511, 768; 1 De G., M. & G. 645; 16 Beav. 400; 83 Va. 386.)

HAIGHT, J. This action was brought to foreclose a mortgage for \$16,500 on property known as No. 64 South Fifth avenue in the city of New York, made by the defendant George T. Arnoux to the late Edwin Booth. The trial court found as facts that the plaintiffs, as executors of the last will and testament of Edwin Booth, deceased, were the owners of the bond and mortgage mentioned in the complaint; that default has been made in the payment of the interest due thereon, and that the whole sum secured by the mortgage by reason thereof has become due and payable. He also found as facts that George T. Arnoux, the mortgagor, was the purchaser of the premises from the executors of William Campbell, deceased, who sold and conveyed the same to him under and pursuant to a power of sale contained in the last will and testament of the said Campbell, and such sale was made by said executors pursuant to said power for a lawful purpose, without fraud, and for the intended benefit of said estate and with full knowledge by said executors, and each of them, that the sale to said George T. Arnoux was made, and they intended it to be made, as an out and out sale for the benefit of said estate of said Campbell; that the plaintiffs' testator, Edwin Booth, had, in his lifetime, and in or about the month of January, 1891, deposited with the firm of Arnoux, Ritch & Woodford, attorneys at law, in the city of New York, the sum of \$16,500, to be invested for him on bond and mortgage, and George T. Arnoux, the mortgagor mentioned in the complaint herein, borrowed said sum to enable him to pay the executors of the said Campbell that much of the purchase money on the said premises, and the mortgage aforesaid was given as collateral security to the bond of said George T. Arnoux for the loan made by said Edwin Booth as aforesaid; that in the whole of the transactions aforesaid there was no fraud or deceit practiced by the said Arnoux, Ritch & Woodford, or any one connected with that firm, on the executors of the last will and testament of the said Campbell; but said executors acted advisedly and with full knowledge and upon their own judgment in making the

sale to said George T. Arnoux, and with full knowledge that the said George T. Arnoux borrowed part of the purchase money to pay for the premises from said Booth, and that the mortgage involved in this action was given to secure the amount so borrowed. The court concluded by directing the usual judgment of foreclosure and sale.

There is conflict in the testimony with reference to the details of the transactions of the parties, but the following facts in the case are without substantial dispute. William Campbell died on the 27th day of April, 1888, leaving a last will and testament, which has been duly admitted to probate, by which the defendants Joseph Campbell, Emma Campbell and Martha Campbell were appointed executor and executrices, all of whom have duly qualified and received letters testamentary. The testator left him surviving Sarah Campbell, his widow, and seven children, three of whom are the executors. At the time of his decease, he was seized and in possession of the real property in suit, and the adjoining property thereto, known as No. 62 South Fifth avenue, the two places being worth about \$30,000 each. He left no personal estate of any substantial value. The testator, in his will, after making some specific bequests, devised to his executors all the rest, residue and remainder of his estate, in trust, however, during the natural life of the testator's wife, with remainders of one-seventh to each child, except one in which a further trust was created for her benefit during life. By the tenth clause he provided that "if at any time my executors, or such of them as shall have qualified, the survivors or survivor of them, shall deem it for the best interests of my said estate that any part or parts, or all of my real estate, should be sold, then I authorize and empower my executors, as such, and the survivors and survivor of them; to sell and dispose of any real estate of which I may die seized or interested in and any part or parts thereof, upon such terms and in such manner as they shall deem best, and for that purpose to make, execute and acknowledge all necessary deeds of conveyance therefor." It further appears that, at

the time of the testator's death, his son, James Campbell, was engaged in business with the testator's son-in-law, John D. Phyfe, under the name of Phyfe & Campbell, in the construction of buildings upon lots known in this case as the 98th street property; that the testator in his lifetime had made loans to and had indorsed paper for Phyfe & Campbell, and, upon his decease, there were outstanding claims which were presented against his estate amounting to the sum of \$40,000, to offset which he held claims against Phyfe & Campbell to the extent of \$45,000. On one of these claims a judgment had been entered in favor of the Chemical National Bank for twelve thousand odd dollars. This judgment was entered upon paper drawn by Phyfe & Campbell, indorsed by the testator, and guaranteed by William H. Arnoux. Action was brought in the lifetime of the testator, but judgment was not entered until after his decease. The bank was then paid its claim by Arnoux, the guarantor, who took an assignment of the judgment. Proceedings were then instituted by Arnoux in the Surrogate's Court for the sale of the real estate of the testator for the payment of his debts, and pending these proceedings the arrangement was made between the parties, which has become the subject of this controversy. It does not clearly appear who originated the plan, but the first conversation took place between Phyfe and William H. Arnoux. Phyfe was anxious to get money with which to complete the unfinished houses on the 98th street property. He inquired of Arnoux if the executors could mortgage the testator's real property. Arnoux, upon an examination of the will, advised that the power to mortgage was not given, but that they had the power to sell. After this conversation Arnoux wrote Joseph Campbell, saying: "Mr. Phyfe has made me a proposition which if you join in I will carry out, and I believe it will relieve your property from the lien of my judgment." Subsequently the executors met Arnoux at his office and the arrangement that appears there to have been made was that the executors should sell the property, known as No. 64 South Fifth avenue, to

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George T. Arnoux, a brother of William H. Arnoux, for the sum of \$30,000; that William H. Arnoux, as the agent of Booth, who had money in his hands for investment, should make a loan upon the property for the sum of \$16,500, and that this money should be used for the completion of the buildings upon the 98th street property. Accordingly, the executors deeded to George T. Arnoux and he gave back to them a mortgage for the sum of \$13,500, which, together with the money derived from the loan obtained from Booth, made up the \$30,000, the purchase price of the lot. Up to this time the title to the 98th street property had been in Mrs. Phyfe. William H. Arnoux loaned her the sum of \$300 and thereupon she deeded the property to him with the understanding that it was to secure the repayment of such loan as well as the Chemical National Bank judgment, which had been assigned to him. The \$16,500 derived from Booth was used in part for the payment of taxes and liens upon the property, and the balance placed in the hands of William H. Arnoux, with the understanding that he should pay therefrom the bills for the completion of the buildings upon the property when approved by Joseph Campbell if they exceeded \$100 in amount.

The Appellate Division in its opinion appears to have reached the conclusion that Arnoux having the legal title to the 98th street property derived all the benefit from the expenditure of the money obtained from Booth in the completion of the buildings upon the property. They say: "We fail to find any testimony tending to show that any agreement existed, either verbal or written, by which, as between Arnoux and the estate, the estate could enforce any obligation of Arnoux to hold this property as security for the payment of this judgment, or as security for the repayment to the estate of the amount which the estate had paid to Arnoux to be used in the completion of these buildings. Arnoux did not agree to repay to the estate that sum of money, the proceeds of this mortgage. The proceeds were largely in excess of the sum due to Arnoux on this judgment, the amount of the judg-

ment being slightly over \$12,000, while the amount which was paid to Arnoux of the money of the estate was in the neighborhood of \$16,500. Nor was there any evidence of any agreement by Arnoux or any one else by which this 98th street property could be held as security for the payment of any debt of Phyfe & Campbell, or of this estate, or that upon the completion of the 98th street houses they would be sold and the proceeds applied in any way to the benefit of the estate, except so far as this verbal agreement before mentioned, if carried out, would relieve the estate from the payment of Arnoux's judgment." It appears to us that the learned Appellate Division have misapprehended the conceded facts in this particular. The transaction itself speaks louder than words. Some of the children had before expressed some lack of confidence in Phyfe. The money was not, therefore, turned over to him so that he could proceed and complete the buildings and pay therefor out of the money procured from the estate, but it was left in the hands of Arnoux, who was to pay the bills only when approved by Joseph Campbell, one of the executors. The title was not left in Mrs. Phyfe, so that on the completion of the buildings she could sell the property and pocket the proceeds, but it was conveyed to Arnoux in whom all of the parties appeared to have had confidence. Emma Campbell, one of the executrices, distinctly testifies that the transaction was that the 98th street property was to be improved and completed and that then through its sale the indebtedness of Phyfe & Campbell was to be paid and thereby the indebtedness of her father's estate relieved; that the purpose of raising the money upon the South Fifth avenue property was for the purpose of completing the houses in 98th street so that they could be sold and the indebtedness to the estate liquidated. She also tells us of the arrangement that was made for the leaving of the money in Arnoux's hands for the purpose of paying the bills upon the 98th street property. These facts are too suggestive. Arnoux could not appropriate this property to his own use. True, he might hold it for the repayment of the \$300 loaned by him and for the \$12,000

judgment of the Chemical National Bank which he had been compelled to pay, but beyond that he must be deemed to hold the property in trust for the payment of the claims of Phyfe & Campbell, for which the estate was also liable. It appears that at the time of the transaction in question the 98th street property was incumbered to the amount of \$29,500 ; that foreclosure proceedings had been instituted and were pending at the time that Arnoux took title to the property. The sale provided for in that judgment was adjourned from time to time, but finally took place in 1892, at which time the premises were struck off to one Simon Arndt for \$29,500, and his bid was assigned to Martha Campbell, one of the executrices, to whom the referee's deed was given, and who, under the facts, must be deemed to have taken the title for the benefit of the estate. This deed appears to have passed through the office of Arnoux, Ritch & Woodford, and the inference is permissible that the transfer to Martha Campbell was with the knowledge and approval of Arnoux, if not by his procurement. The subsequent history of the property is not disclosed by the record. Whether the transaction was wise and resulted beneficially to the estate does not finally appear. Phyfe valued the property at \$70,000. An appraiser engaged by Arnoux valued it at \$65,000. If the executrix, who now holds the title, succeeds in selling the property for its appraised value, \$35,000 or \$40,000 in excess of the bid upon the foreclosure sale will be derived, out of which the claims for which the estate is liable can be paid and the indebtedness of Phyfe & Campbell to the estate largely reduced.

The Appellate Division reversed the judgment, both upon the law and the facts, and directed final judgment for the defendants. It does not appear from the record that that court assumed to make any findings of fact ; but it does appear from the opinion filed that the conclusion was reached that the deed from the executors to George T. Arnoux was intended and understood to be a mortgage.

It is now contended that the case comes before this court with all the issues of fact raised by the pleadings found in

favor of the defendants, and that the sole question left for the determination of this court is, whether, upon the facts so found, the determination of the Appellate Division is erroneous. We cannot assent to this proposition. The power of the Appellate Division to reverse upon the facts is limited to cases in which the findings of the trial court are unsupported by testimony, or are made against the weight of evidence. Where the findings of the trial court are in accordance with the conceded facts or the uncontroverted testimony, the Appellate Division is not authorized to reverse upon the facts; and, if it does, a question of law is presented which this court may properly review. (*Otten v. Manhattan R. Co.*, 150 N. Y. 395-400.)

The Appellate Division may reverse or affirm wholly or partly, or may modify the judgment appealed from, and may, if necessary or proper, grant a new trial. (Code C. P. sec. 1317.) But we think in this case the Appellate Division had no power to order final judgment; that in case it saw fit to reverse, its duty was to order a new trial.

The deed was absolute in form, and it could only be found to be a mortgage where such was intended to be its force and effect. This intention had to be determined from the oral testimony of the witnesses. Evidence was given tending to show that it was the understanding of the parties that after the money had been obtained from Booth the premises were to be redeeded to the executors; but this evidence was sharply controverted, and the trial court found for the plaintiffs upon this issue, and it cannot now be said that other evidence may not be found which will sustain the plaintiffs' contention in the event of a new trial.

It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court to determine controverted questions of fact and render final judgment upon such determination. It is only in cases where the facts are conceded or undisputed, or are established by official record or found by the trial court, that

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such a court is justified in awarding final judgment. This subject was considered in the case of *Edmonston v. McLoud* (16 N. Y. 543), in which it was held that, when a verdict or the report of a referee for the plaintiff is set aside upon a case, and it appears that no possible state of proof applicable to the issues will entitle him to judgment, the appellate court may render final judgment for the defendant. This rule has been followed in analogous cases, such as *King v. Barnes* (109 N. Y. 267-282); *Brackett v. Griswold* (128 N. Y. 644-648); *Fischer v. Blank* (138 N. Y. 669).

In the case of *Griffin v. Marquardt* (17 N. Y. 28) it was held that the Supreme Court is bound to grant a new trial on reversing a judgment, unless the case be within the exception stated in *Edmonston v. McLoud* (*supra*), and that a refusal to do so was an error of law reviewable in this court.

In the case of *Schenck v. Dart* (22 N. Y. 420) COMSTOCK, Ch. J., says: "Under the former system of procedure, where a judgment in an action at law was reversed upon writ of error, a *venire de novo*, or new trial, was always granted. In equity causes, on the other hand, the appellate court, if it reversed the decree appealed from, proceeded to make a new and complete adjudication, such as the pleadings and proofs in the cause warranted and required. According to the new code of practice, actions at law and suits in equity are no longer distinguishable as such; and the question has several times arisen as to the power and duty of an inferior appellate court where the judgment reviewed is reversed. We have followed the analogy of the practice in legal actions, and have determined that, in such cases, a new trial must be granted, unless indeed it is apparent, in the very nature of the case, that the party against whom the reversal is pronounced can never succeed in the action."

In the case of *Cuff v. Dorland* (57 N. Y. 560-564) REXNOLDS, C., says: "Upon the appeal from the judgment dismissing the plaintiff's complaint, the General Term of the Supreme Court had power to reverse, affirm or modify the judgment appealed from, * * *. That court did reverse the judgment appealed from and then rendered a final judgment in

favor of the plaintiff, who had been defeated below, for such sum as from an examination of the evidence it was thought he should have recovered at the Special Term. This the General Term had no power to do. They had power to order final judgment when the facts were agreed to by the parties or found by the court or a jury on the trial. (*Purchase v. Matteson*, 25 N. Y. 211.) The assumption of authority in this case would not be more apparent, if the General Term had in the first instance, ignoring the Special Term altogether, undertaken to try the issue, hear the evidence and render judgment as a court of original jurisdiction."

In the case of *Whitehead v. Kennedy* (69 N. Y. 462-468) ANDREWS, J., says: "The Code authorizes the Appellate Court upon an appeal from a judgment or order to reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the notice of appeal or to order a new trial. This power must be construed in view of the character and function of an appellate court, and of the fundamental principle, that questions of fact are to be investigated and determined in the court of original jurisdiction. It is not the appropriate function of an appellate court to determine controverted questions of fact, and render final judgment upon such determination. This would be substituting another tribunal from that known to the Constitution and the laws for the trial of causes."

In the case of *Guernsey v. Miller* (80 N. Y. 181) DANFORTH, J., says: "The General Term erred in directing judgment in favor of Van Kleeck. It cannot be said that upon a new trial the case would remain unaltered. The facts are not undisputed, and as it does not appear that the respondent is entitled to judgment in his favor, as matter of law, the issues made by the respective parties should have been sent back to the trial court for its determination. (*Astor v. L'Amoreux*, 8 N. Y. 107.) It is not sufficient that it is improbable that the defeated party can succeed upon the new trial; it must appear that he certainly cannot, to justify an appellate court in rendering a final judgment against him." (See, also,

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Thomas v. N. Y. Life Ins. Co., 99 N. Y. 250; *Parsons v. City Bank*, 57 N. Y. 637; *Hall v. Erwin*, 57 N. Y. 643; *Andrews v. N. J. S. Co.*, 11 Hun, 490-495; *Price v. Price*, 33 Hun, 432.) The recent amendment of section 1022 of the Code of Civil Procedure has not, in our judgment, changed the practice in this particular. The provision that "the Appellate Division shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial or grant to either party the judgment which the facts warrant," should be considered in connection with section 1317 and construed in harmony therewith. The court may grant the judgment which the facts warrant. This has reference to facts conceded, uncontroverted, established by records or found by the trial court. It was never intended to include controverted facts upon which issue had been joined and on which parties were entitled to a trial by a jury. We are aware that this is an action in equity, but actions at law and in equity under the Code are no longer distinguishable as such, and the practice on review in such actions is the same. This question was settled in the case of *Schenck v. Dart*, to which reference has been made, and since that decision has been the settled doctrine of this court.

Our understanding of the facts is not fully in accord with the views of the Appellate Division, but, in disposing of this case, we have no power to review controverted facts. Our view of the practice, to which attention has been called, would require a modification of the judgment so as to order a new trial in case the judgment was properly reversed. But we are inclined to the view that the judgment ought not to have been reversed, even though it should now be found that the facts are in accordance with the expressed views of the Appellate Division. We shall, therefore, assume, for the purposes of this case but without so deciding, that the power given by the will was that of a sale for the benefit of the estate, and did not include a power to mortgage. We further assume, in accordance with the views of the Appellate Division, that the arrangement made between Arnoux and the executors of the estate to deed to

Arnoux's brother, who was to mortgage the property and return the money to the executors, was, in effect, a scheme to evade the provisions of the will, and constituted the deed a mortgage. We thus find the executors, possessed of all the facts, entering into an arrangement with Arnoux, as the agent of Booth, to obtain a loan of money from him, out of which they hoped to derive a benefit for the estate. We find Arnoux, also possessed of all the facts, holding a judgment against the estate for upwards of \$12,000, which he is desirous and interested in having paid, agreeing with the executors to make a loan of his principal's money upon this paper, hoping and expecting thereby to secure the payment of his own claim. It affirmatively appears in the case that Booth knew nothing of the transaction. It is claimed, however, that the knowledge of his agent is imputable to him. This is true to a limited extent; so long as the agent acts within the scope of his employment in good faith, for the interest of his principal, he is presumed to have disclosed to his principal all the facts that come to his knowledge as agent; but just as soon as the agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases, in fact, to be an agent acting in good faith for the interest of his principal, and his action thereafter based upon such purpose is deemed to be in fraud of the rights of his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails. The citation of authorities to sustain this proposition is hardly necessary, but it may not be out of place to call attention to the case of *Henry v. Allen* (151 N. Y. 1), in which this court has recently said: "The general rule that notice to the agent, while acting within the scope of his authority and in regard to a matter over which his authority extends, is notice to the principal, rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency and upon the presumption that he has discharged that duty. (*Casco Nat.*

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Bank v. Clark, 139 N. Y. 307, 313; *Hyatt v. Clark*, 118 N. Y. 563; *Case of the Distilled Spirits*, 11 Wall. 356, 367.) This presumption, however, does not always arise, for there are several exceptions well recognized by the authorities. Thus, when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose. (*Innerarity v. Merchants' National Bank*, 139 Mass. 332; *S. C.*, 52 Am. Rep. 710; *Weisser v. Denison*, 10 N. Y. 68, 76; *Frenkel v. Hudson*, 82 Ala. 158; *Western M. & I. Co. v. Ganzer*, 63 Fed. Rep. 647; *Hudson v. Randolph*, 66 Fed. Rep. 216; *Kettlewell v. Watson*, L. R. [21 Ch. Div.] 707; *Cave v. Cave*, L. R. [15 Ch. Div.] 639; *Mechem on Agency*, § 721.)” Mr. Pomeroy says in his work on Equity Jurisprudence: “When an agent or attorney has in the course of his employment been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed.” (§ 675.)

It is said that a person dealing with an executor or trustee must look to his authority or he will act at his peril. Very true, Booth was chargeable with constructive notice of all that appeared of record. Upon going to the will he would find that the executors were given the power of sale. Upon examining the record of the register's office he would find an absolute deed given to George T. Arnoux in consideration for \$30,000, the conceded value of the property. The fact that the executors had executed this deed indicated that they had exercised their judgment and discretion called for by the power given in the will. There thus appeared from the

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record a perfect title in George T. Arnoux, from which he might safely make the loan upon the mortgage. The oral arrangement made between his agent and the executors, in which they, under the view of the Appellate Division, devised a scheme to evade the provisions of the will, he knew nothing of, and inasmuch as they were acting for their own interests and advantage and in fraud of his rights, the law will not impute to him, under the circumstances, the information possessed by his agent.

The judgment of the Appellate Division should be reversed, and that entered upon the decision of the Special Term affirmed, with costs.

All concur, except O'BRIEN, J., not voting.

Judgment reversed, etc.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

LOUIS FLEISCHMANN, Respondent, *v.* MENDEL SAMUEL et al.,
Appellants.

Fleischmann v. Samuel, 18 App. Div. 97, appeal dismissed.
(Argued October 4, 1897; decided October 12, 1897.)

MOTION to dismiss appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 19, 1897, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The motion was made upon the grounds that the decision of the Appellate Division that the verdict was supported by the evidence was unanimous, and that no questions of law are raised by appellants' exceptions which can be reviewed by the Court of Appeals.

M. Hallheimer for motion.

Herman Stiefel opposed.

Motion granted and appeal dismissed, with costs.

JAMES WHITE, Respondent, *v.* JAMES D. RANKIN, Appellant,
et al.

Reported below, 18 App. Div. 293.
(Argued October 4, 1897; decided October 12, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 19, 1897, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The motion was made upon the ground that no issue of law is involved herein reviewable by the Court of Appeals.

Hector M. Hitchings for motion.

John D. Pray opposed.

Motion denied, with ten dollars costs.

In the Matter of the Examination of **STANLEY M. HATFIELD**, Appellant, formerly known as **OSCAR HATFIELD**, in Proceedings Supplementary to Execution ; **GILBERT RAY HAWES**, Respondent.

Reported below, 17 App. Div. 430.

(Argued October 4, 1897; decided October 12, 1897.)

MOTION to open default for failure to file within the time required by section 1315 of the Code of Civil Procedure and the rules of the court, the return on appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 10, 1897, which affirmed an order of Special Term adjudging the appellant guilty of contempt of court.

Henry Cooper for appellant.

Gilbert Ray Hawes, respondent, in person.

Motion granted on payment of costs of former order and ten dollars costs of this motion within ten days. On failure to comply with these terms the motion is denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. **WILLIAM STRAUSS**, Appellant, *v.* **THEODORE ROOSEVELT** et al., Police Commissioners of the City of New York, Respondents.

(Submitted October 4, 1897; decided October 12, 1897.)

MOTION for reargument denied, with costs. (See 153 N. Y. 657.)

IRENE E. STORM, an Infant, by Guardian ad Litem, Appellant, *v.* T. SCHENCK REMSEN, as Committee, etc., et al., Respondents.

Reported below, 11 App. Div. 680.

(Submitted October 4, 1897; decided October 12, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 30, 1896, which modified, and as modified affirmed, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that no issue of law is involved herein reviewable by the Court of Appeals.

Hector M. Hitchings for motion.

No one opposed.

Motion denied, with ten dollars costs.

WILLIAM L. RICH, as Administrator of JOSIAH RICH, Deceased, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Rich v. N. Y. C. & H. R. R. Co., 89 Hun, 604, affirmed.

(Argued October 5, 1897; decided October 19, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 14, 1895, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Circuit.

Esek Cowen for appellant.

William Allen Butler for respondent.

Judgment affirmed, with costs; no opinion.

All concur, except O'BRIEN and VANN, JJ., not voting.

GEORGE H. PRESTON et al., Appellants, v. JOHN C. HOWK, as
Executor of JULIA A. FREER, Deceased, et al., Respondents.

Preston v. Howk, 3 App. Div. 43, affirmed.

(Submitted June 23, 1897; decided October 19, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 3, 1896, which affirmed a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on trial at Special Term, and also affirmed an order of Special Term granting an additional allowance of costs.

W. Martin Jones for appellants.

H. R. Durfee for respondent Howk.

S. B. M'Intyre for trustees of Presbyterian church,
respondent.

Judgment affirmed, with costs, on opinion below.

All concur, except GRAY, J., absent, HAIGHT, J., dissenting,
and VANN, J., not voting.

PEOPLE OF THE STATE OF NEW YORK ex rel. ANTHONY J. BURGER et al., Respondents, v. BENJAMIN F. BLAIR et al., as the Board of Elections of the City of Brooklyn, Appellants.

SAME, Appellants, v. SAME, Respondents.

People ex rel. Burger v. Blair, 21 App. Div. 213, affirmed.

(Argued October 20, 1897; decided October 22, 1897.)

APPEALS from orders of the Appellate Division of the Supreme Court in the second judicial department, entered October 19, 1897, one of which affirmed an order of Special Term granting a peremptory writ of mandamus to compel the board of elections of the city of Brooklyn to receive and file the certificate of nomination of the relators as coroners of the

borough of Brooklyn, and the other of which affirmed an order of Special Term denying relators' application for a peremptory writ of mandamus to compel the board to receive and file their nomination as coroners of the county of Kings.

Joseph A. Burr for defendants.

Nathaniel H. Clement and *Isaac M. Kapper* for relators.

Orders affirmed on opinion below.

All concur.

In the Matter of the Complaint under Section 56 of the Election Law, respecting the Certificates of Nomination of THE CITIZENS UNION; WILLIAM McCLOSKEY, Appellant; THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF NEW YORK, Respondent.

Matter of Certificates of Citizens Union, 21 App. Div. 626, affirmed.
(Argued October 25, 1897; decided October 25, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 19, 1897, which affirmed an order of the Special Term sustaining the determination of the board of police commissioners of the city of New York overruling written objections to the certificates of nomination filed by the Citizens Union.

Roger M. Sherman, *Stillman F. Kneeland* and *Otto Irving Wise* for appellant.

Horace E. Deming, *Joseph Larocque*, *Simon Sterne* and *William B. Hornblower* for Citizens Union.

Theodore Connolly for the board of police commissioners, respondent.

Order affirmed.

JAMES ROOSEVELT, as Executor and Trustee of WILLIAM EDGAR HOWLAND, Deceased, Respondent, v. THE LAND AND RIVER IMPROVEMENT COMPANY, Appellant, et al., Respondents.

Roosevelt v. Land & River Improvement Co., 3 App. Div. 563, affirmed. (Argued October 6, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 1, 1896, which modified and, as modified, affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Edward B. Hill and *Alfred Jeretzki* for appellant.

James R. Soley, *Charles E. Miller*, *Payson Merrill*, *B. D. Silliman* and *Frederic A. Ward* for respondents.

Judgment affirmed on opinion below, with costs.
All concur.

WILLIAM HAUX, as Executor of WILLIAM HAUX, Deceased, et al., Respondents, v. THE DRY DOCK SAVINGS INSTITUTION et al., Respondents; JOHN T. DOWNING, as Guardian ad Litem of JAMES J. DOWNING, et al., Appellants.

Haux v. Dry Dock Savings Institution, 2 App. Div. 165, affirmed. (Argued October 7, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 24, 1896, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at a Special Term of the late Superior Court of the city of New York.

Hector M. Hitchings for appellants.

Joseph Rowan for respondents.

Judgment affirmed, with costs; no opinion.
All concur.

WILLIAM W. MUMFORD, as Receiver of GEORGE H. POWELL et al., Respondent, v. GEORGE W. CROUCH et al., Appellants.

Mumford v. Crouch, 8 App. Div. 529, affirmed.

(Argued October 8, 1897; decided October 26, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 1, 1896, which reversed a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on trial at Special Term and granted a new trial.

Horace G. Pierce for appellants.

Elbridge L. Adams for respondent.

Order affirmed, and judgment absolute ordered against the defendants, with costs, on opinion below.

All concur.

In the Matter of the Judicial Settlement of the Accounts of
CHARLES B. DUNN, as Executor of JOSEPH C. BARNES,
Deceased.

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FRANCES M. BARNES, Appellant; HERBERT S. BARNES et al.,
Respondents.

Matter of Barnes, 7 App. Div. 18, affirmed.

(Argued October 8, 1897; decided October 26, 1897.)

APPEAL from that portion of an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1896, which modified and, as modified, affirmed a decree of the Surrogate's Court of the city and county of New York rendered upon the accounting by an executor.

Robert L. Harrison for appellant.

Henry B. Anderson and *Allen W. Johnson* for respondents.

Order appealed from affirmed, with costs in this court to be paid by the appellant; no opinion.

All concur.

JANE MCKENZIE et al., as Executrices of ALEXANDER MCKENZIE, Deceased, Appellants, v. LOFTUS D. HATTON, Respondent.

McKenzie v. Hatton, 15 Misc. Rep. 105, affirmed.
(Submitted October 8, 1897; decided October 26, 1897.)

APPEAL from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered December 28, 1895, which affirmed a judgment in favor of defendant entered upon a verdict.

Lewis Johnston and *Edward W. S. Johnston* for appellants.

James C. Foley for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

SUSAN HAMILTON, as Administratrix of WILLIAM HAMILTON, Deceased, Appellant, v. CATHERINE BRENNAN, Respondent.

Hamilton v. Brennan, 90 Hun, 340, affirmed.
(Argued October 8, 1897; decided October 26, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department, entered February 18, 1896, and an order made November 15, 1895, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Circuit, without a jury.

Delos McCurdy and *John Yard* for appellant.

Bernard J. Tinney for respondent.

Judgment and order affirmed, with costs; no opinion.
All concur.

MARIA D. MITCHELL, as Sole Surviving Executrix of AARON H. MITCHELL, Deceased, Appellant, v. FRANK H. BALL et al., as Executors of EDWIN J. DIXON, Deceased, Respondents.

Mitchell v. Ball, 88 Hun, 614, affirmed.
(Argued October 8, 1897; decided October 26, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered August 20, 1895, which affirmed a judgment in favor of defendants entered upon the report of a referee dismissing the complaint upon the merits.

Chester M. Elliott for appellant.

John D. Teller for respondents.

Judgment affirmed, with costs; no opinion.
All concur.

HENRY W. LAWTON, as Administrator of JACOB D. LAWTON, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Lawton v. N. Y. C. & H. R. R. R. Co., 2 App. Div. 616, affirmed.
(Argued October 8, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 27, 1896, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. D. Prescott for appellant.

A. B. Steele for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

WINIFRED COLLINS, as Executrix of LAWRENCE COLLINS,
Deceased, Appellant, *v.* NEW YORK, CHICAGO AND ST.
LOUIS RAILROAD COMPANY, Respondent.

Collins v. N. Y., Chicago & St. Louis R. R. Co., 92 Hun, 563, affirmed.
(Argued October 11, 1897; decided October 26, 1897.)

APPEAL from a judgment of the General Term of the
Supreme Court in the fifth judicial department, entered
January 30, 1896, which affirmed a judgment in favor of
defendant entered upon a nonsuit at the Erie Circuit.

Frank Brundage for appellant.

John G. Milburn for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

FREDRIKA F. MUNN, Appellant, *v.* ERNEST M. MUNN,
Respondent.

(Argued October 11, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the first judicial department, entered Janu-
ary 20, 1896, which affirmed a judgment in favor of defend-
ant entered upon the report of a referee dismissing the com-
plaint upon the merits.

William Pierrepont Williams for appellant.

John S. Davenport for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

NICOLAS GEOFFROY, as Administrator of JENNIE CLARKSON GEOFFROY, Deceased, Respondent, *v.* ALEXANDER GILBERT et al., as Executors of WILLIAM R. CLARKSON, Deceased, et al., Appellants.

Geoffroy v. Gilbert, 5 App. Div. 98, affirmed.
(Argued October 11, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1896, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term, and directed judgment in favor of plaintiff.

John S. Durand for appellants.

Joseph Fettretch for respondent.

Judgment affirmed, with costs, on opinion below.
All concur.

EDWARD C. BURNS et al., as Executors of CHARLOTTE O. BLACK, Deceased, Respondents, *v.* AUGUSTUS F. ALLEN et al., by Guardian ad Litem, Appellants, et al., Respondents.

Burns v. Allen, 89 Hun, 552, affirmed.
(Argued October 11, 1897; decided October 26, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered October 22, 1895, which affirmed a judgment entered upon a decision of the court on trial at Special Term in an action for the construction of a will.

Spencer Clinton for appellants.

Charles B. Wheeler, Stillman F. Kneeland and George Barker for respondents.

Judgment affirmed, with costs, on opinion below.
All concur.

JONATHAN BULKLEY et al., Respondents, v. JOSEPH J. LITTLE,
as Receiver of the WORTHINGTON COMPANY, Appellant.

Bulkley v. Little, 9 App. Div. 627, affirmed.
(Submitted October 12, 1897; decided October 26, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 16, 1896, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court.

James M. Fisk for appellant.

Frederic A. Ward for respondents.

Judgment affirmed, with costs; no opinion.
All concur.

WILLIAM O. PLATT et al., as Trustees, Respondents, v. NEW YORK AND SEA BEACH RAILWAY COMPANY et al.; AUGUST MEIDLING, JR., Appellant.

(Submitted October 18, 1897; decided October 26, 1897.)

Motion for reargument denied, with ten dollars costs. (See 153 N. Y. 670.)

In the Matter of the Accounting of FRANK J. HONE, as Receiver of CHARLES F. LIGHTHOUSE, a Judgment Debtor, Appellant; THOMAS J. SWANTON et al., Respondents.

(Submitted October 18, 1897; decided October 26, 1897.)

Motion for reargument denied, with ten dollars costs. (See 153 N. Y. 522.)

WILLIAM C. CHAMBERS, as Assignee of CHARLES A. DIXON,
Respondent, v. JAMES H. LANCASTER et al., Appellants.

Reported below, 8 App. Div. 215. 619.

(Argued October 18, 1897; decided October 26, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 25, 1896, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the decision of the Appellate Division that there was evidence supporting or tending to sustain the findings of fact of the trial court was unanimous, and that it cannot be reviewed by the Court of Appeals.

C. L. Waring for motion.

Joseph F. Daly opposed.

Motion denied, with ten dollars costs.

WILLIAM FERNSCHILD, Appellant, v. D. G. YUENGLING BREW-
ING COMPANY, Respondent.

Reported below, 15 App. Div. 29.

(Argued October 18, 1897; decided October 26, 1897.)

MOTION to substitute the receiver of the D. G. Yuengling Brewing Company as sole defendant herein, in place of the D. G. Yuengling Brewing Company dissolved, and also to prefer, under section 791, subdivisions 4, 5, of the Code of Civil Procedure, and under section 10, chapter 378, Laws of 1883, an appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1897, which reversed a judgment of

the Appellate Term of the Supreme Court in the city of New York in favor of plaintiff, and affirmed a judgment of the General Term of the City Court of New York, in favor of defendant.

Forster, Hotelling & Klenke for motion.

Moses Weinman opposed.

Motion granted.

JULIA POMEROY NEWELL, Respondent, *v.* JOSEPH POMEROY et al., Defendants; FRANK R. CHANDLER, as Executor of GEORGE P. POMEROY, Deceased, Appellant.

Reported below, 3 App. Div. 619.

(Argued October 18, 1897; decided October 26, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 16, 1896, which affirmed a final judgment in an action of partition.

The motion was made upon the grounds that the appellant is not a party aggrieved, within the provisions of section 1294 of the Code of Civil Procedure; that no questions of law are raised by the appeal which can be reviewed by the Court of Appeals, and that the questions raised or sought to be raised are without merit and frivolous.

Blackwell Brothers for motion.

F. L. Minton opposed.

Motion denied, without prejudice to the respondent's right to raise the question of the appellant's status upon the argument of the appeal; no costs.

In the Matter of the Probate of the Will of ANGELINA CRANE, Deceased.—EDITH H. SIMMONS, Appellant; THE FARMERS' LOAN AND TRUST COMPANY et al., Respondents.

Reported below, 12 App. Div. 271.

(Argued October 18, 1897; decided October 26, 1897.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 13, 1897, which affirmed a decree of the Surrogate's Court of the county of New York admitting to probate the will of Angelina Crane, deceased.

The motion was made upon the ground that the appeal was not taken within sixty days after service of a copy of the order of affirmance with notice of entry thereof.

David McClure for motion.

A. Prentice opposed.

Motion denied, with ten dollars costs.

HAWLEY D. CLAPP, Respondent, v. WILLIAM F. McCABE, Appellant.

Reported below, 84 Hun, 379.

(Submitted October 18, 1897; decided October 26, 1897.)

MOTION to dismiss an appeal from a judgment of the General Term of the Supreme Court in the second judicial department, entered February 16, 1895, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The motion was made upon the ground that no practical effect could be given to a decision upon the merits by the Court of Appeals.

A. Britton Havens for motion.

Wm. Sam. Johnson opposed.

Motion denied, with ten dollars costs.

CHARLES HUTCHINSON, Respondent, v. MARY F. ROOT,
Appellant.

Reported below, 2 App. Div. 584.

(Argued October 18, 1897; decided October 26, 1897.)

RENEWED MOTION (see 153 N. Y. 329) to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered upon an order made March 20, 1896, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William R. Wilder and *Frederic D. Philips* for motion.

William C. Cammann opposed.

Motion denied, with ten dollars costs.

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In the Matter of the Appraisal of the Property of PHILIP EMBURY, Deceased, under "An Act to Tax Gifts, Legacies and Collateral Inheritances in Certain Cases."

THE COMPTROLLER OF THE CITY OF NEW YORK, Appellant;
BENJAMIN T. KISSAM et al., as Executors, Respondents.

Matter of Embury, 19 App. Div. 214, affirmed.

(Argued October 4, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made June 11, 1897, which reversed an order of the surrogate of the county of New York denying the application of the executors of the decedent to dismiss the proceeding, and dismissed the proceeding.

Emmet R. Olcott for appellant.

Lucius H. Beers for respondents.

Order affirmed, with costs, on opinion below.

All concur, except VANN, J., not voting.

In the Matter of the Probate of the Will of MYRA CLARK
GAINES, Deceased.

JULIETTA PERKINS et al., Appellants, v. WILLIAM H. WILDER
et al., Respondents.

Matter of Gaines, 83 Hun, 225; 84 Hun, 520, 611, affirmed.
(Argued October 14, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered February 18, 1895, which affirmed a decree of the surrogate of Kings county admitting to probate the will of Myra Clark Gaines, deceased.

Also, appeal from an order of the General Term, entered February 11, 1895, dismissing an appeal from an order of the surrogate directing certain letters to be printed as part of the record on appeal.

Also, appeal from an order of the General Term, entered January 11, 1895, denying a motion to punish respondents for violating the statutory stay effected by appellants' appeal to the General Term.

John A. Grow for appellants.

William T. Gilbert for respondents.

Judgment and orders affirmed, with costs; no opinion.
All concur.

In the Matter of the Mechanics' Lien filed by LOUIS CATTABERRY, as Claimant, Respondent, v. JOHN A. KNOX, Contractor and Owner, et al., Appellants.

Matter of Cattaberry v. Knox, 17 App. Div. 372, affirmed.
(Argued October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 14, 1897, which reversed an order of Special Term denying

a motion by claimant to set aside an order vacating and canceling a notice of lien filed by the claimant.

J. Homer Hildreth for appellants.

James A. Dunn for respondent.

Order affirmed, with costs, on opinion below.

All concur.

CYRUS B. ELSWORTH, Plaintiff, *v.* EDWARD J. WOOLSEY et al.,
Defendants.

GEORGE B. LAUCK, Appellant, *v.* GEORGE W. COTTERILL,
Respondent.

Elsworth v. Woolsey, 19 App. Div. 385, affirmed.

(Argued October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 16, 1897, which affirmed an order of Special Term overruling exceptions to the report of a referee and confirming the report.

Henry G. Atwater and *Wilfrid N. O'Neil* for appellant.

George W. Cotterill respondent in person.

Order affirmed on opinion below, with costs.

All concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. SAMUEL J. UNDERHILL, Individually and as Supervisor of the Town of Oyster Bay, Appellant, *v.* CHARES T. SAXTON et al., as Commissioners of the Land Office of the State of New York, Respondents.

In re Applications of LOUISE B. W. LADEW, LOUIS T. DURYEA et al., NORTH COUNTRY COMPANY and CHARLES A. DANA, for Grants of Lands under Water.

People ex rel. Underhill v. Saxton, 15 App. Div. 263, affirmed.

(Argued October 18, 1897; decided November 23, 1897.)

APPEALS from orders and judgments of the Appellate Division of the Supreme Court in the third judicial depart-

ment, entered April 12, 1897, which affirmed, on certiorari, in each of the above-entitled matters, the action of the commissioners of the land office granting an application for lands under tide waters in the town of Oyster Bay.

Thomas Young and *Edward Cromwell* for appellant.

Wilmot T. Cox and *Franklin Bartlett* for respondents.

Orders and judgments affirmed on opinions below, with costs.
All concur.

CHARLES S. KENT, Respondent, *v.* ASA K. WEST, Impleaded with GEORGE F. WEST et al., as Committee of the Person and Property of ASA K. WEST, Appellants.

Kent v. West, 16 App. Div. 496, affirmed.

(Submitted October 18, 1897; decided November 23, 1897.)

APPEAL from an order and judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 15, 1897, which affirmed an order of Special Term denying a motion to restrain the prosecution of the action and to punish the plaintiff for contempt of court in prosecuting it.

Jenney & Jenney for appellants.

E. N. Wilson for respondent.

Order and judgment affirmed, with costs; no opinion.
All concur.

WILLIAM W. BLACKMER, Appellant, *v.* FRED C. GREENE;
JOHN H. ROBINSON, Respondent.

Blackmer v. Greene, 20 App. Div. 532, affirmed.

(Argued October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered October 1, 1897, which reversed an order of Special Term

denying a motion by a judgment creditor of the defendant Greene to set aside and vacate plaintiff's judgment against him.

C. H. Sturges for appellant.

Edgar T. Brackett for respondent.

Order affirmed on opinion below, with costs.

All concur.

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156		47
156		52

PEOPLE OF THE STATE OF NEW YORK ex rel. H. MARVIN WELLS, Appellant, v. THE COMMON COUNCIL OF THE CITY OF ELMIRA, N. Y., Respondent.

People ex rel. Wells v. Collin, 19 App. Div. 457, affirmed.
(Submitted October 18, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 13, 1897, which reversed an order of Special Term granting a peremptory writ of mandamus.

James Bacon and *Judson A. Gibson* for appellant.

S. S. Taylor for respondent.

Order affirmed on opinion below, with costs.

All concur.

In the Matter of the Probate of the Will of DAVID F. BECK, Deceased; GEORGE B. OWEN, as Executor, and FRANCIS A. McCLOSKEY, Special Guardian, Appellants; HELEN KAY et al., Respondents.

Matter of Beck, 6 App. Div. 211, affirmed.
(Argued October 19, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 9, 1896, which affirmed a decree of the surrogate of Kings county admitting a will to probate and allowing costs payable out of the estate. The executor appeals from so

much of the order as allows costs; the special guardian from so much of the same as affirms the decree of the surrogate.

Robert Stewart for special guardian, appellant, and for Helen Kay et al., respondents.

George Carlton Comstock for executor appellant.

Order affirmed on opinion below, without costs to either party.

All concur.

HARMON HENDRICKS, as Substituted Trustee under the Will of CHARLOTTE GOMEZ, Deceased, *v.* ALBERT HENDRICKS et al., Appellants; REBECCA SAMUEL et al., Respondents.

Hendricks v. Hendricks, 8 App. Div. 604, affirmed.
(Argued October 19, 1897; decided November 23, 1897.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made June 11, 1896, which modified and as modified affirmed a final judgment entered upon the report of a referee.

Michael H. Cardozo for appellants.

George W. Wickersham and *Alfred Lyons* for respondents.

Order affirmed on opinion below, with costs.

All concur, except BARTLETT, J., dissenting.

WILLIAM G. MILLIGAN, as Sole Surviving Administrator with the Will Annexed of CATHERINE M. LANSING, Deceased, et al., Respondents, *v.* OCTAVIUS O. COTTLE et al., Appellants.

Milligan v. Cottle, 92 Hun, 323, affirmed.
(Argued October 20, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 26, 1895, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Edmund P. Cottle for appellants.

John Lansing for respondents.

Order and judgment affirmed on opinions below, with costs.
All concur, except MARTIN and VANN, JJ., not sitting.

HENRY S. LAWRENCE et al., as Administrators of WILLIAM H. LAWRENCE, Deceased, Respondents, *v.* THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

Lawrence v. Niagara Fire Ins. Co., 2 App. Div. 267, affirmed.
(Argued October 21, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 26, 1896, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

P. J. C. De Angelis for appellant.

Joseph Larocque, Jr., for respondents.

Judgment and order affirmed on opinion below, with costs.
All concur.

GEORGE B. FERGUSON, by Guardian ad Litem, Respondent,
v. MARSHALL N. SMITH et al., Appellants.

Ferguson v. Smith, 15 Misc. Rep. 251, affirmed.
(Argued October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Superior Court of Buffalo, entered December 30, 1895, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Adolph Rebadow for appellants.

Harry D. Williams for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

CLARA OTTENDORFF, as Administratrix of JOHANN PHILLIP OTTENDORFF, Deceased, Respondent, v. JAMES WILLIS, Appellant.

Ottendorff v. Willis, 80 Hun, 262, affirmed.

(Argued October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 1, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Nathan Ottinger for appellant.

Norman A. Lawlor for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

MAY AUGUSTA LENZ, by Guardian ad Litem, Appellant,
v. ELIZABETH W. ALDRICH, Respondent.

Lenz v. Aldrich, 6 App. Div. 178, affirmed.

(Argued October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 3, 1896, which affirmed a judgment in favor of defendant entered upon a nonsuit.

W. W. Niles, Jr., for appellant.

James L. Barger for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

IDA M. NEWCOMBE, as Executrix of RICHARD S. NEWCOMBE,
Deceased, Respondent, *v.* WILLIAM I. FOX, Appellant.

Newcombe v. Fox, 1 App. Div. 389, affirmed.

(Submitted October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1896, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

Michael A. Quinlan for appellant.

William H. Hamilton for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

GORDON G. HARRIS et al., by Guardian ad Litem, Substituted
in Place of EMILY HARRIS, Deceased, Respondents, *v.* ARCHIBALD M. GRAHAM, Appellant.

Harris v. Graham, 90 Hun, 198, affirmed.

(Submitted October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered December 19, 1895, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Charles T. Saxton for appellant.

E. W. Hamm for respondents.

Judgment affirmed, with costs; no opinion.
All concur.

HENRY S. DARBY, as Assignee of WILLIAM SEGERITZ et al., Appellant, v. THE HINCKEL BREWING COMPANY, Respondent.

Darby v. Hinckel Brewing Co., 11 App. Div. 632, affirmed.
(Argued October 22, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 16, 1896, which affirmed a judgment in favor of defendant entered upon a verdict.

George B. Wellington for appellant.

Robert G. Scherer and *J. Murray Downs* for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

JAMES McDONALD, as Guardian ad Litem of SARA A. McDONALD, Respondent, v. THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Appellant.

McDonald v. N. Y., Chicago & St. Louis R. R. Co., 13 Misc. Rep. 651, affirmed.
(Argued October 25, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Superior Court of Buffalo, entered July 31, 1895, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Louis L. Babcock for appellant.

Walter S. Jenkins for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

RICHARD A. AITKIN, Respondent, v. NELLIE L. AITKIN, as Administratrix with the Will Annexed of J. SCOTT AITKIN, Deceased, Appellant.

Aitken v. Aitken, 4 App. Div. 414, affirmed.
(Argued October 25, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered April 30, 1896, upon an order made April 27, 1896, which modified, and as modified affirmed, a judgment in favor of plaintiff entered upon the report of a referee.

Bernard J. Tinney for appellant.

A. V. S. Cochrane for respondent.

Order and judgment affirmed, with costs, on opinion below.
All concur.

ADDISON L. UPHAM, as Administrator of CYNTHIA PHELPS, Deceased, Respondent, v. JEFFERSON COUNTY SAVINGS BANK, Appellant.

Upham v. Jefferson Co. Savings Bank, 9 App. Div. 632, affirmed.
(Argued October 25, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 2, 1896, upon an order made October 16, 1896, which affirmed a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Samuel Child for appellant.

H. L. Hooker for respondent.

Order and judgment affirmed, with costs; no opinion.
All concur.

GUSTAVE HEYE, as Sole Surviving Executor of ALEXANDER M. LAWRENCE, Deceased, Appellant, *v.* HENRY M. TILFORD, as Sole Surviving Executor of JOHN C. GILES, Deceased, et al., Respondents.

Heye v. Tilford, 2 App. Div. 846, affirmed.
(Argued October 25, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 16, 1896, which affirmed a judgment in favor of defendant entered upon the report of a referee.

Edward B. Hill for appellant.

Peter B. Olney for respondents.

Judgment affirmed, with costs ; no opinion.
All concur.

REMY LAFORT, Respondent, *v.* WILLIAM R. BRIDGES, Impleaded, etc., as Assignee of JAMES H. CARPENTER, Appellant.

Lafort v. Carpenter, 91 Hun, 76, affirmed.
(Argued October 26, 1897; decided November 23, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the third judicial department, entered December 9, 1895, upon an order made December 3, 1895, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

J. Newton Fiero for appellant.

James B. Egan for respondent.

Judgment and order affirmed, with costs, on opinion below.
All concur.

MARY E. PETERS, as Administratrix of RODY PETERS, Deceased,
Respondent, v. THE UNITED STATES INDUSTRIAL INSURANCE
COMPANY, Appellant.

Peters v. United States Ind. Ins. Co., 10 App. Div. 533, affirmed,
(Argued October 26, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the second judicial department, entered
December 14, 1896, which affirmed a judgment in favor of
plaintiff entered upon a verdict, and also affirmed an order
denying a motion for a new trial.

Edward W. S. Johnston for appellant.

Isaac M. Kapper for respondent.

Judgment and order affirmed on opinion below, with costs.
All concur.

JOSEPH LAGACE, by Guardian ad Litem, Respondent, v. TROY
WASTE MANUFACTURING COMPANY, Appellant.

Lagace v. Troy Waste Mfg. Co., 11 App. Div. 632, affirmed.
(Argued October 26, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered
December 5, 1896, which affirmed a judgment in favor of
plaintiff entered upon a verdict, and also affirmed an order
denying a motion for a new trial.

Edward W. Douglas for appellant.

Mark Cohn for respondent.

Judgment affirmed, with costs; no opinion.
All concur.

MAGGIE LEWIS, Appellant, v. IDA M. NEWCOMBE, as Executrix
of RICHARD S. NEWCOMBE, Deceased, Respondent.

Lewis v. Newcombe, 1 App. Div. 59, affirmed.
(Argued October 27, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 4, 1896, upon an order made January 29, 1896, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Abram Kling for appellant.

William H. Hamilton for respondent.

Order and judgment affirmed on opinion below, with costs.
All concur, except MARTIN and VANN, JJ., who dissent.

EMMA CONDIT SMITH, as Executrix of GEORGE CONDIT SMITH,
Deceased, and as Guardian of SALLIE BARNES SMITH et al.,
Appellant, v. WILLIAM PENNINGTON, Respondent.

Smith v. Pennington, 12 App. Div. 378, affirmed.
(Argued October 28, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1896, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint at a Trial Term, a jury having been waived.

Alex. Thain for appellant.

John Brooks Leavitt for respondent.

Judgment affirmed on opinion below, with costs against appellant personally.
All concur.

WILLIAM T. GILBERT, as Receiver of THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY, Appellant, v. THOMAS C. PLATT, as President of THE UNITED STATES EXPRESS COMPANY, Respondent.

Gilbert v. Platt, 12 App. Div. 242, affirmed.

(Argued October 28, 1897; decided November 23, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1896, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Henry D. Hotchkiss for appellant.

Francis G. Kimball and *Frank H. Platt* for respondent.

Judgment affirmed, on opinion below, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES BURGESS, Appellant.

(Submitted November 22, 1897; decided November 24, 1897.)

MOTION for reargument denied. (See 153 N. Y. 561.)

WILLIAM LORD, as Executor of MARTHA A. CRONIN, Deceased, Respondent, v. JOHN H. CRONIN, Appellant.

(Submitted November 22, 1897; decided November 30, 1897.)

Motion for reargument denied, with ten dollars costs. (See 154 N. Y. 172.)

MARY E. HOFFLER, Respondent, v. MARY R. HOFFLER, Appellant.

(Argued November 22, 1897; decided November 30, 1897.)

Reported below, 21 App. Div. 688.

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial depart-

ment, entered October 25, 1897, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The motion was made upon the grounds that the Court of Appeals has no jurisdiction; that the Appellate Division has not allowed the appeal, and that the notice of appeal contains no stipulation for judgment absolute in case of affirmance.

William E. Edmonds for motion.

Raines Bros. opposed.

Motion denied, with ten dollars costs.

In the Matter of the Judicial Settlement of the Accounts of CHARLES B. DUNN, as Executor of JOSEPH C. BARNES, Deceased. FRANCES M. BARNES, Appellant; HERBERT S. BARNES et al., Respondents.

(Submitted November 22, 1897; decided November 30, 1897.)

Motion for reargument denied, with ten dollars costs. (See 154 N. Y. 737.)

DAVID THOMSON, as Trustee of the Estate of BENJAMIN LORD, Deceased, and MARY HANSON v. EMMA C. HILL et al., Appellants, Impleaded with GILBERT M. HUSTED, Respondent, LORENZO GOODWIN et al.

Reported below, 87 Hun, 111.

(Argued November 22, 1897; decided November 30, 1897.)

MOTION to dismiss an appeal from a judgment of the General Term of the Supreme Court in the first judicial department, entered June 8, 1895, which affirmed a judgment entered upon a decision of the court on trial at Special Term in an action for the construction of a will.

The motion was made upon the ground that the appellants have derived some benefit from the judgment appealed from and so are estopped.

James F. Pendleton for motion.

Louis A. Noble and *Noah Tebbetts* opposed.

Motion denied, with ten dollars costs.

In the Matter of the Application of JULIUS J. MICHAEL, a
Student at Law.

(Submitted November 22, 1897; decided November 30, 1897.)

MOTION to file certificate of clerkship *nunc pro tunc* as of April 8, 1891, and to direct the regents of the university to issue a certificate under the rules of 1882.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANFORD
N. BARNEY, Appellant, v. EDWARD P. BARKER et al., as
Commissioners of Taxes and Assessments of the City of
New York, Respondents.

People ex rel. Barney v. Barker, 16 App. Div. 266, affirmed.
(Argued November 22, 1897; decided December 7, 1897.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered respectively April 23 and 17, 1897, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment against the relator upon personal property for the year 1896.

H. M. Whitehead for appellant.

Francis M. Scott and *James M. Ward* for respondents.

Judgment and order affirmed, with costs, on opinion below.
All concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE BROOKLYN CITY RAILROAD COMPANY et al., Respondents and Appellants, v. B. G. NEFF et al., Composing the Board of Assessors of the City of Brooklyn, Appellants and Respondents.

People ex rel. Brooklyn R. R. Co. v. Neff, 19 App. Div. 590, affirmed. (Argued November 22, 1897; decided December 7, 1897.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 3, 1897, which affirmed an order of Special Term setting aside an assessment made upon the capital stock of the relator and directing a reassessment.

Joseph A. Burr for defendants.

Henry Yonge, for relators.

Order affirmed, with costs, on opinion below.

All concur, except GRAY, J., not sitting.

SAMUEL E. DALE, Appellant, v. LEONARD F. HEPBURN et al., as Executors of LOUISA F. HEPBURN, Deceased, Respondents.

Dale v. Hepburn, 11 Misc. Rep. 286, affirmed. (Argued November 23, 1897; decided December 14, 1897.)

APPEAL from a judgment of the Court of Common Pleas for the city and county of New York, entered February 28, 1895, upon an order overruling plaintiff's exceptions to the dismissal of the complaint on the trial, ordered to be heard in the first instance at General Term, and directing judgment for defendant.

J. Noble Hayes for appellant.

Wm. S. Cogswell for respondents.

Judgment and order affirmed, with costs; no opinion.

All concur.

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MARY D. YOUNGS, as Administratrix of FREDERICK A. YOUNGS,
Deceased, Appellant, v. NEW YORK, ONTARIO AND WESTERN
RAILWAY COMPANY, Respondent.

Young v. N. Y., Ontario & W. R. R. Co., 77 Hun, 612, affirmed.
(Argued November 23, 1897; decided December 14, 1897.)

APPEAL from a judgment of the General Term of the
Supreme Court in the fourth judicial department, entered
May 26, 1894, which affirmed a judgment in favor of defend-
ant entered upon a decision of the court dismissing the com-
plaint on trial at Circuit, and also affirmed an order denying a
motion for a new trial.

P. C. J. De Angelis for appellant.

Howard D. Newton for respondent.

Judgment affirmed, with costs; no opinion.

All concur, except MARTIN, J., who takes no part.

CASPER G. DECKER, as Receiver of the Property of FRANCIS
G. HALL, Appellant, v. WILLIAM S. CARR et al., Executors
of SAMUEL S. HAMLIN, Deceased, et al., Respondents.

Decker v. Carr, 11 App. Div. 432, affirmed.
(Argued November 24, 1897; decided December 14, 1897.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered
December 8, 1896, which affirmed a judgment in favor of
defendants entered upon a decision of the court dismissing the
complaint on trial at Special Term.

David B. Hill for appellant.

Charles J. Bissell and *John A. Reynolds* for respondents.

Judgment affirmed, with costs; no opinion.

All concur, except GRAY, O'BRIEN and HAIGHT, JJ., who
dissent.

SEYMOUR LOWMAN, as Administrator of CHARLES G. JUDD, Deceased, Respondent, *v.* THE ELMIRA, CORTLAND AND NORTHERN RAILROAD COMPANY, Appellant.

Lowman v. Elmira, C. & N. R. R. Co., 85 Hun, 188, affirmed.
(Argued November 24, 1897; decided December 14, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered February 27, 1895, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Frederick Collin for appellant.

Erwin J. Baldwin for respondent.

Judgment affirmed, with costs, on opinion below.
All concur.

In the Matter of the Judicial Settlement of the Account of FREDERICK NOLL, as General Guardian of EMELIE WEIMANN et al., Respondents; JOHN G. LANDMANN et al., Appellants.

Matter of Noll, 10 App. Div. 356, affirmed.
(Argued November 29, 1897; decided December 14, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 19, 1896, upon an order which affirmed a decree of the surrogate of Kings county judicially settling the account of a general guardian.

Joseph Potter, George F. Martens and Thomas J. Farrell for appellants.

Peter W. Ostrander and James D. Bell for respondents.

Judgment and order affirmed, with costs; no opinion.
All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ALBERT P. WICKS, Appellant.

People v. Wicks, 11 App. Div. 539, affirmed.

(Argued November 29, 1897; decided December 14, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 4, 1897, which affirmed a judgment of the Ontario County Court, convicting the defendant of the crime of grand larceny.

P. Chamberlain and *John Gillette* for appellant.

Royal R. Scott for respondent.

Judgment affirmed; no opinion.

All concur.

BENJAMIN PARR et al., as Executors and Trustees of SUSAN
P. LILIENTHAL, Deceased, Appellants and Respondents, v.
THE CITY OF YONKERS, Respondent and Appellant.

Lilienthal v. City of Yonkers, 6 App. Div. 188, affirmed.

(Argued November 29, 1897; decided December 14, 1897.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1896, which modified and, as modified, affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Frederick W. Holls and *Joseph F. Daly* for plaintiffs.

James M. Hunt for defendant.

Judgment affirmed on opinion below, without costs to either party.

All concur.

JESSE L. VAN GAASBECK, Respondent, *v.* THE TOWN OF SAUGERTIES, Appellant.

Van Gaasbeck v. Town of Saugerties, 82 Hun. 415, affirmed.
(Argued November 30, 1897; decided December 14, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the third judicial department, entered December 14, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Peter Cantine for appellant.

John J. Linson for respondent.

Judgment affirmed, with costs, on opinion below.
All concur.

JAMES C. FARGO et al., as Executors of WILLIAM G. FARGO, Deceased, Respondents, *v.* HERBERT G. SQUIERS et al., as Executors of GEORGIA FARGO, Deceased, et al., Appellants, and MARY C. FARGO and ANNA E. FARGO, Respondents.

(Submitted December 6, 1897; decided December 14, 1897.)

MOTION to amend remittitur by inserting in the provision relating to costs therein, the words, "in the courts below as well as in this court," denied, without costs. (See 154 N. Y. 250.)

CHARLES S. FAIRCHILD et al., as Executors of MARY A. EDSON, Deceased, Respondents, v. MARGARET B. EDSON, Individually and as Executrix of MARMONT B. EDSON, Deceased, Impleaded, etc., Appellant, et al., Appellants and Respondents.

MARGARET B. EDSON, Individually and as Executrix of MARMONT B. EDSON, Deceased, Appellant, v. JOHN A. BARTOW et al., Executors of MARY A. EDSON, Deceased, Appellants, Impleaded with WILLIAM R. HUNTINGTON et al., Respondents.

(Submitted December 6, 1897; decided December 14, 1897.)

MOTION for reargument denied, without costs. (See 154 N. Y. 199.)

RICHARD A. MCNEELEY, Respondent, v. JOHN WELZ and CHARLES ZERWECK, Appellants, Impleaded with HENRY W. MICHELL et al.

Reported below, 20 App. Div. 566.

(Argued December 6, 1897; decided December 14, 1897.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 11, 1897, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the exceptions are frivolous and that the decision of the Appellate Division was unanimous.

E. D. Benedict for motion.

M. Hallheimer opposed.

Motion denied, with ten dollars costs.

NATIONAL PARK BANK of New York, Respondent, v. THE
ELDRED BANK, Appellant.

National Park Bank v. Eldred Bank, 90 Hun, 285, affirmed.
(Argued December 1, 1897; decided December 17, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department, entered December 16, 1895, upon an order which overruled defendant's exceptions, ordered to be heard in the first instance at General Term, and ordered judgment in favor of plaintiff upon a verdict directed by the court on trial at Circuit.

Herman Aaron for appellant.

Robert D. Murray for respondent.

Judgment and order affirmed, with costs, on opinion below.
All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
PETER GARRAHAN, Appellant.

People v. Garrahan, 19 App. Div. 347, affirmed.
(Argued December 1, 1897; decided December 17, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 2, 1897, which affirmed a judgment of the Court of General Sessions of the city and county of New York entered upon a verdict convicting the defendant of the crime of grand larceny in the second degree.

John Sherwin Crosby and *Abraham Gruber* for appellant.

John D. Lindsay for respondent.

Judgment affirmed on opinion below.
All concur.

154a	770
168	807
168	841

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ISAAC ZUCKER, Appellant.

People v. Zucker, 20 App. Div. 863, affirmed.
(Argued December 1, 1897; decided December 17, 1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 13, 1897, which affirmed a judgment of a Criminal Trial Term, entered upon a verdict convicting defendant of the crime of arson in the first degree.

Benjamin Steinhardt for appellant.

John D. Lindsay for respondent.

Judgment affirmed on opinion of PATTERSON, J., below.
All concur.

WESLEY J. PENNY, by Guardian ad Litem, Respondent, v.
ROCHESTER RAILWAY COMPANY, Appellant.

Penny v. Rochester R. Co., 7 App. Div. 595, affirmed.
(Argued December 2, 1897; decided December 17, 1897.)

APPEAL, by certification, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 24, 1896, which unanimously affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The questions certified were as follows:

First. Did the trial court err in sustaining the plaintiff's objection to the following question put by the defendant's counsel to John Greenwood, a witness sworn for the plaintiff, to wit: "Q. Did you enter your grandfather's house in the night time, through an open window, and take from the room an article of value and carry it away with you without his permission?"

Second. Did the trial court err in submitting to the jury the question whether the plaintiff, at the time of the accident, was or was not *non sui juris*, and in refusing to charge as requested by the defendant's counsel that on the evidence in the case they could not find that the plaintiff was, at the time of the accident, *non sui juris*?

Third. Did the trial court err in refusing to charge unqualifiedly the proposition requested by the defendant's counsel, that if the jury find that the plaintiff saw the car coming and heard the signal and ran out in front with the purpose of getting across ahead of it, and failed, that that was contributory negligence in him as matter of law that bars a recovery here?

Charles J. Bissell for appellant.

Henry M. Hill for respondent.

Judgment affirmed, with costs, on opinion below, and each question certified answered in the negative.

All concur, except HAIGHT, J., absent.

JOHN E. WALLS, as Administrator of CATHERINE WALLS,
Deceased, Respondent, v. ROCHESTER RAILWAY COMPANY,
Appellant.

Walls v. Rochester R. Co., 92 Hun, 581, affirmed.

(Argued December 2, 1897; decided December 17, 1897.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered February 28, 1896, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Charles J. Bissell for appellant.

Thomas Raines for respondent.

Judgment affirmed, with costs; no opinion.

All concur, except HAIGHT, J., absent.

112 MEMORANDA.
MARY A. CORBETT, as Administratrix of THOMAS CORBETT,
Deceased, Appellant, v. THE BROOKLYN, BATH AND WEST
END RAILROAD COMPANY, Respondent.

Corbett v. Brooklyn, Bath & W. E. R. R. Co., 84 Hun, 375, affirmed.
(Argued December 2, 1897; decided December 17, 1897.)

APPEAL from a judgment of the General Term of the
Supreme Court in the second judicial department, entered
December 21, 1896, upon an order which affirmed a judgment
in favor of defendant entered upon a decision of the court
dismissing the complaint on trial at Circuit.

Thomas F. Magner for appellant.

James R. Soley for respondent.

Judgment and order affirmed, with costs; no opinion.
All concur, except HAIGHT, J., absent.

EXCELSIOR STEAM POWER COMPANY et al., Appellants, v. THE
COSMOPOLITAN PUBLISHING COMPANY, Respondent.

Excelsior Co. v. Cosmopolitan Co., 80 Hun, 592, reversed.
(Argued December 14, 1897; decided December 17, 1897.)

APPEAL from an order of the General Term of the Supreme
Court in the first judicial department, entered October 26,
1894, which reversed a judgment in favor of plaintiffs entered
upon the report of a referee and granted a new trial.

Alfred G. Reeves for appellants.

William L. Findley for respondent.

Order of General Term reversed and judgment entered on
report of referee affirmed, with costs, upon opinion of FOLLETT,
J., below.

Concur: ANDREWS, Ch. J., O'BRIEN, BARTLETT and MAR-
TIN, JJ.

Dissent: GRAY, HAIGHT and VANN, JJ.

JOSEPH LAGACE, by Guardian ad Litem, Respondent, v. TROY
WASTE MANUFACTURING COMPANY, Appellant.

(Submitted December 6, 1897; decided January 11, 1898.)

MOTION for reargument. (See 154 N. Y. 758.)

Edward W. Douglas for motion.

Mark Cohn opposed.

Per Curiam. This motion for a reargument is based upon the grounds which appellant urges must have been overlooked, viz., the plaintiff's contributory negligence, and the law of obvious risk.

We gave the case originally a very careful examination, upon both the facts and the law, but we have again gone over it, in view of the very urgent and able briefs submitted by the learned counsel for the appellant. There is great force in the argument that the verdict was against the decided weight of evidence, and relief might very properly have been afforded to the defendant by the trial judge, or at the Appellate Division, but we are without jurisdiction to deal with this situation.

We are unable to say that there were any legal errors committed which would justify a reversal of the judgment.

The motion for a reargument should be denied, but without costs.

All concur.

Motion denied.

In the Matter of the Application of ISAAC E. PYE et al.,
Respondents, for the Revocation of Letters Testamentary
Issued to ERASTUS VAN HOUTEN, Appellant, upon the
Estate of EDWARD G. VAN HOUTEN, Deceased.

Matter of Pye, 18 App. Div. 306, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the second judicial department, entered

June 14, 1897, which affirmed an order of the Surrogate's Court of Rockland county adjudging appellant guilty of contempt and fining him.

Garrett Z. Snider for appellant.

John M. Perry for respondents.

Order affirmed, with costs, on opinion below, without prejudice, however, to an application to the Surrogate's Court for a modification of the order imposing a fine in case of a reversal of the decree settling the accounts of the executors and in case it should turn out on the final accounting that there was sufficient property to pay the debts of the testator. All concur.

In the Matter of the Application of EDWIN V. WELCH, for the Appointment of a Trustee in Place of HENRY A. BASSFORD, Deceased, under a Trust Deed Executed by VIRGINIA L. WELCH to HENRY A. BASSFORD, Dated October 20, 1884. EDWIN V. WELCH and GEORGE F. ELLIOTT, as Trustees, Appellants; BESSIE V. REINISCH et al., Respondents.

Matter of Welch, 20 App. Div. 412, affirmed.

(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered August 17, 1897, which affirmed an order vacating an order appointing George F. Elliott trustee of the estate created by a trust deed.

Henry M. Dater for appellants.

Frederick F. Neuman and *Daniel P. Hays* for respondents.

Order affirmed, with costs, on opinion below. All concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EUGENE A. MASTERSON, Respondent, v. JAMES J. MARTIN et al., Police Commissioners of the City of New York, Appellants.

People ex rel. Masterson v. Martin, 17 App. Div. 555, affirmed.
(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 24, 1897, which reversed, on certiorari, a determination of the board of police commissioners of the city of New York dismissing the relator from the police force of the city and directed his reinstatement.

Theodore Connoly and Francis M. Scott for appellants.

Louis J. Grant for respondent.

Order affirmed, with costs, on opinion below.
All concur.

In the Matter of Acquiring Title by THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, to Certain Lands in the Sixth Ward of the City; GEORGETTE BROWN et al., Appellants.

Matter of Mayor of New York, 20 App. Div. 626, appeal dismissed.
(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 4, 1897, which affirmed an order of Special Term denying an application on behalf of certain property owners to vacate an order appointing commissioners of appraisal.

Henry F. Miller, John L. Cadwalader and J. Frederick Kernochan for appellants.

Theodore Connoly and Francis M. Scott for respondent.

Appeal dismissed, with costs; no opinion.
All concur.

In the Matter of the Application of GEORGE W. PALMER, as Comptroller of the City of Brooklyn, Respondent, for a Peremptory Writ of Mandamus; JOSEPH BENJAMIN, City Clerk, Appellant.

Matter of Palmer, 21 App. Div. 180, affirmed.
(Argued December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 12, 1897, which reversed an order of Special Term denying an application for a peremptory writ of mandamus.

Hugo Hirsh for appellant.

Joseph A. Burr for respondent.

Order affirmed, with costs, on opinion below.
All concur.

FREDERICK HOLTHAUSEN et al., Respondents, v. WILLIAM E. KELLS et al., as Executors of THOMAS KELLS, Deceased, Appellants.

Holthausen v. Kells, 18 App. Div. 80, affirmed.
(Submitted December 6, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 18, 1897, upon an order which affirmed a judgment in favor of plaintiffs entered upon a decision of the Kings County Court.

Henry Cooper for appellants.

Daniel Cameron for respondents.

Judgment and order affirmed, with costs, on opinion below.
All concur.

In the Matter of the Examination of JOHN T. ROWLAND, a Judgment Debtor, in Supplementary Proceedings, Appellant; PHEBE HOBBY, as Administratrix of DAVID R. HOBBY, Deceased, Respondent.

Matter of Rowland, 21 App. Div. 172, affirmed.
(Submitted December 6, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made October 12, 1897, which affirmed an order of the county judge of Rockland county denying a motion to vacate an order for examination of a judgment debtor in supplementary proceedings.

Charles D. Ridgway for appellant.

William J. Griffin for respondent.

Order affirmed, with costs; no opinion.

All concur.

MARY EGAN, as Administratrix of EDWARD EGAN, Deceased, Appellant, v. THE NEW JERSEY STEAMBOAT COMPANY, Respondent.

Egan v. New Jersey Steamboat Co., 86 Hun, 542, affirmed.
(Argued December 7, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the third judicial department, entered May 29, 1895, upon an order reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial.

Olin A. Martin for appellant.

W. P. Prentice for respondent.

Judgment and order affirmed, with costs, on opinion below, and judgment absolute ordered for the defendant on the stipulation.

All concur.

154a 778
154 540
154a 778
1164 77
154 778
Case 1
171 852

In the Matter of the Judicial Settlement of the Account of
ROBERT C. EMBREE, as Executor and Trustee of JACOB W.
MORRIS, Deceased; DRAYTON BURRILL et al., Trustees et al.,
Appellants; LEWIS MORRIS et al., Respondents.

Matter of Embree, 9 App. Div. 602, affirmed.

(Argued December 7, 1897; decided January 11, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 16, 1896, and from the decree made in pursuance thereof, which reversed certain portions of a decree of the Surrogate's Court of the county of New York, settling the accounts of an executor and trustee of the will of Jacob W. Morris, deceased, and construing the will.

William G. Choate for appellants.

H. Snowden Marshall for respondents.

Order and decree affirmed and judgment absolute ordered for respondents, with costs, on opinion below.

All concur.

CLOTHILDE BODINE et al., Respondents, *v.* RONALD K. BROWN et al., as Trustees of GEORGE CHESTERMAN, Deceased, et al., Appellants; LOUIS A. S. BODINE et al., Respondents.

Bodine v. Brown, 12 App. Div. 335, affirmed.

(Argued December 8, 1897; decided January 11, 1898.)

APPEAL, by certification, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1896, which affirmed an interlocutory judgment entered upon a decision of the court at Special Term, confirming the report of a referee upon the trial of issues in an action for partition.

The questions certified were as follows:

First. Whether under the will and codicils of George Chesterman appearing in the record, the words "heirs of such child," in the 8th clause of said will, mean the heirs of the

body or issue of such child, or whether they mean the persons who would inherit the real estate of which such child might die seized under the law of New York, in case such child died intestate.

Second. Whether in case of the death of either of the children of George Chesterman, the testator, without leaving issue, the fourth part of the real estate of said testator set apart for the use of such child so dying, is to be distributed among the surviving brothers and sisters of such child so dying without issue, and the issue of any deceased brother or sister, *per stirpes* or *per capita*.

Third. Whether in case of the death of either of the children of said testator without issue, the said testator, George Chesterman, died intestate in respect to the remainder in the share of the real estate of said testator set apart for the benefit of such child during his or her life.

William G. Choate and *George W. Van Slyck* for appellants.

Charles F. Brown and *F. J. Worcester* for respondents.

Judgment affirmed on opinion below, with costs, and the questions certified to this court answered as follows:

First. The words "heirs of such child," in the 8th clause of the testator's will, mean the person or persons who, in case such child should die intestate, would, under the laws of New York, inherit the real estate of which he or she might die seized.

Second. If any of the children of the testator die without leaving issue, the one-fourth of the real estate set apart for the use of that child is to be distributed among his or her surviving brothers and sisters and the issue of any deceased brother or sister *per capita* and not *per stirpes*.

Third. In case of the death of any of his children without issue, the testator did not die intestate in respect to the remainder in the share set apart for the benefit of each child during life, but it goes to his or her heirs at law to be equally divided between them.

All concur.

MICHAEL BOWEN, Respondent, v. MICHAEL SWEENEY et al.,
Appellants.

Bowen v. Sweeney, 89 Hun, 359, affirmed.

(Argued December 9, 1897; decided January 11, 1898.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department and from the judgment entered thereon October 23, 1895, which affirmed a final judgment in an action of partition, an interlocutory judgment and an order denying a motion to set aside a verdict and for a new trial.

William H. Arnoux and *Francis C. Devlin* for appellants.

Flamen B. Candler and *Robert W. Candler* for respondent.

Order and judgment affirmed, with costs ; no opinion.

All concur.

JOSEPH ALBERT, as Administrator of LORETTA ALBERT,
Deceased, Appellant, v. THE ALBANY RAILWAY,
Respondent.

Albert v. Albany Railway Co., 5 App. Div. 544, affirmed.

(Argued December 9, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 27, 1896, upon an an order reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial, and also from an order entered October 7, 1896, amending the order of reversal.

J. Newton Fiero for appellant.

Simon W. Rosendale for respondent.

Judgment and order affirmed, with costs, on opinion below, and judgment absolute ordered for defendant on the stipulation.

All concur, except O'BRIEN, J., not voting.

CATHARINE A. WHITLOCK, Respondent, v. THE TOWN OF
BRIGHTON, Appellant.

154a	781
168	124

Whitlock v. Town of Brighton, 2 App. Div. 21, affirmed.
(Argued December 10, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 26, 1896, which affirmed a judgment in favor of plaintiff entered upon a verdict, and from an order of the Appellate Division which affirmed an order denying a motion for a new trial.

Theodore Bacon for appellant.

William F. Cogswell for respondent.

Judgment and order affirmed, with costs; no opinion.
All concur.

WILLIAM H. CLAPP, Respondent, v. THE TOWN OF ELLINGTON,
Appellant.

Clapp v. Town of Ellington, 87 Hun, 542, affirmed.
(Argued December 13, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered June 28, 1895, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Frank W. Stevens for appellant.

A. C. Wade for respondent.

Judgment affirmed, with costs, on opinion below.
All concur, except HAIGHT, J., not sitting.

WILLIAM B. DAVENPORT, Public Administrator, as Administrator of MICHAEL J. GARRY, Deceased, Respondent, v. THOMAS MORRISSY et al., as Executors of THOMAS GARRY, Deceased, Appellants.

Davenport v. Morrissey, 14 App. Div. 586, affirmed.
(Argued December 14, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1897, upon an order reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial before another referee.

Samuel Untermeyer and *Louis Marshall* for appellants.

Charles H. Otis for respondent.

Judgment affirmed, with costs, on opinion below, and judgment absolute ordered for plaintiff in accordance with stipulation.

All concur.

J. MARTIN WHITE et al., Respondents, v. JOHN C. SCHREIBER, Appellant.

White v. Schreiber, 86 Hun, 348, affirmed.
(Argued December 14, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered May 7, 1895, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

P. C. J. De Angelis for appellant.

William Townsend for respondents.

Judgment and order affirmed, with costs, on opinion below.
All concur, except MARTIN and VANN, JJ., not sitting.

EDWARD C. JONES et al., Respondents, v. CHARLES F. GALE,
as Receiver of THE ELMIRA NATIONAL BANK, Appellant.

Jones v. Gale, 11 App. Div. 632, affirmed.

(Argued December 14, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 23, 1896, upon an order affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

George J. Sicard for appellant.

Samuel D. Halliday for respondents.

Judgment and order affirmed, with costs; no opinion.

All concur.

ESTELLE FLOYD, as Administratrix of WALLACE J. FLOYD,
Deceased, Appellant, v. ELIZABETH FLOYD, Respondent.

Floyd v. Floyd, 89 Hun, 604, affirmed.

(Argued December 15, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 23, 1895, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit without a jury.

Thomas J. Ritch, Jr., for appellant.

Timothy M. Griffing for respondent.

Judgment affirmed, with costs; no opinion.

All concur, except O'BRIEN and BARTLETT, JJ., who dissent.

ELIZA W. RANDALL, Appellant, v. ARINGTON H. CARMAN, as
Assignee of SEWARD S. SMITH, Respondent.

Randall v. Carman, 89 Hun, 84, affirmed.

(Argued December 15, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered

September 28, 1895, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury and dismissed the complaint.

Thomas J. Ritch, Jr., for appellant.

Timothy M. Griffing for respondent.

Judgment affirmed, with costs, on opinion below.

All concur.

GEORGE BORGFELDT & Co., Appellant, v. GEORGE B. WOOD
et al., Respondents.

Borgfeldt v. Wood, 92 Hun, 260, affirmed.

(Argued December 16, 1897; decided January 11, 1898.)

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered January 15, 1896, upon an order affirming a judgment in favor of defendants entered upon a verdict directed by the court.

James Dunne and Charles E. Ide, for appellant.

Charles W. Andrews for respondents.

Judgment and order affirmed, with costs, on opinion below.

All concur.

LEWIS R. STEGMAN, as Late Sheriff of Kings County, Respondent, v. HENRY S. HOLLINGSWORTH, Appellant.

Stegman v. Hollingsworth, 6 App. Div. 609, affirmed.

(Argued December 16, 1897; decided January 11, 1898.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 7, 1896, upon an order affirming a judgment in favor of plaintiff entered upon a verdict.

Fernando Solinger for appellant.

George Lawyer for respondent.

Judgment and order affirmed, with costs; no opinion.

All concur.

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ANIMALS.

Domestic Animals—Vicious Propensity. The fact that a pair of ordinarily manageable and gentle horses on one occasion broke from their driver and ran away on a public street, through fright naturally following from the conduct of third parties, does not of itself constitute a vicious propensity; nor does knowledge thereof render their owner liable, in the absence of negligence, if he thereafter uses them and they again run away from the same cause, and injure another. *Benoit v. Troy & L. R. Co.* 223

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APPEAL.

1. *Reversal by General Term — New Trial.* On appeal from a judgment of a late General Term reversing a judgment in favor of an infant for damages for personal injuries alleged to have been suffered through the negligence of the defendants as owners of leased premises, and dismissing the complaint upon the merits, where there had been a motion for a new trial on the grounds that the verdict was against the weight of evidence and excessive, and the order of reversal did not state whether it was based on the law or the facts, *held*, that the reversal should be modified so as to order a new trial — it not appearing that other evidence might not be in existence which might materially change the facts. *Canavan v. Stuyvesant.* 84
2. *Motion to Dismiss — Frivolous Exceptions.* To sustain a motion to dismiss an appeal before argument, on the ground that the judgment below has been unanimously affirmed by the Appellate Division as to the facts and that the exceptions in the case are frivolous, the exceptions must be so obviously frivolous on their face as to require no argument to demonstrate it. *Bachrach v. Manhattan R. Co.* 178
3. *Testamentary Trust.* Where there remains a possibility that the contingencies contemplated by a will, upon which remainders to the immediate beneficiaries of a trust may be defeated, will happen, the question as to whether certain items are to be treated as income or as capital is one in which the trustees have a legal interest sufficient to warrant an appeal. *McLouth v. Hunt.* 179
4. *Question of Fact.* On appeal from a judgment of reversal, the Court of Appeals cannot review a decision of the Appellate Division upon a question of fact, if there was any evidence to support the conclusion of the Appellate Division. *Fuirchild v. Edson.* 199
5. *Appellate Division — Final Judgment on Reversal, Instead of New*

Trial. Under the power possessed by the Appellate Division to grant to either party the judgment which the facts warrant, on review of a decision which does not state separately the facts found (Code Civ. Pro. § 1022), that court is not required to grant a new trial on reversing a judgment as to one of several parties, but may properly order final judgment against him when it is apparent that the facts were all disclosed and could not be changed on a new trial. *Id.*

6. *Presumption of Question of Law.* Where, in an action tried by the court or a referee, the decision did not state separately the facts found (Code Civ. Pro. § 1022), whether the Appellate Division, upon its review, either reverses and orders a new trial, or grants a final judgment to either party, if its order is silent as to the grounds, section 1338 controls and requires the presumption that the reversal was upon a question of law. *Bomeisler v. Forster.* 229
7. *Scope of Review by Court of Appeals.* Upon appeal from an order and judgment of the Appellate Division, reversing a judgment in favor of the plaintiff and dismissing the complaint upon the merits, in an action tried by the court or a referee, where the decision did not state separately the facts found and the order of the Appellate Division is silent as to its grounds, the review by the Court of Appeals is confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the relief awarded him and, if there was no error in that respect, whether there were errors of law committed in the rulings upon the trial, which would, in any event, have justified a reversal of the judgment and rendered a new trial necessary. *Id.*
8. *Appeal from Reversal of Judgment on Verdict.* An appeal does not lie to the Court of Appeals from a judgment of an Appellate Division of the Supreme Court, reversing a judgment and order and granting a new trial, when the

- appeal to the Appellate Division was not only from a judgment entered upon the verdict of a jury, but also from an order denying a motion for a new trial upon the ground that the verdict was against the weight of evidence, and the order of reversal does not state whether it was upon the law or facts, or both. *Henavie v. N. Y. C. & H. R. R. Co.* 278
9. *Code Civ. Pro. § 1338 — Amendment — Jury Trial.* The substitution of the words "a determination in the trial court" for the words "a decision of the trial court upon a trial without a jury," in section 1338 of the Code of Civil Procedure, by the amendment of 1895 (Ch. 948), did not extend the right of review by the Court of Appeals of a reversal of a judgment entered upon the verdict of a jury. *Id.*
10. *Appellate Division — Reversal — New Trial.* The Appellate Division, upon reversing a judgment, must grant a new trial unless it is manifest that no possible proof applicable to the issue could entitle the respondent to recover. *Heller v. Cohen.* 299
11. *Capital case — Interference with Verdict.* When it appears that the facts and circumstances testified to justified the jury in finding that the homicide was intentional, and that it was the result of sufficient deliberation and premeditation to warrant the verdict of murder in the first degree, the Court of Appeals will not interfere with the determination of the jury upon the facts. *People v. Sutherland.* 345
12. *Criminal Trial — Striking out Testimony.* Where, on a criminal trial, the whole testimony of a witness called by the prosecution was stricken out by the court, and the greater part of the testimony was objected to by the defendant, and the record discloses no objection to its being stricken out, it must be assumed that the defendant consented; and, consequently, if any error was committed in its admission or in striking it out, and directing the jury to disregard it, the defendant is not in a position to avail himself of it on appeal. *People v. Koerner.* 355
13. *Capital Case — Striking out Testimony.* The striking out by the trial court of the whole testimony of a witness called by the prosecution, does not furnish a ground for the reversal of a judgment of death, when it is obvious that the substantial rights of the defendant could not have been affected by eliminating that testimony from the case and directing the jury to disregard it. *Id.*
14. *Criminal Trial — Order of Proof — Discretion of Court.* Upon the trial of a criminal action it is in the discretion of the court to permit the prosecution to give evidence in aid of its original case, after the defense has rested; and a judgment will not be disturbed on appeal, on account of the granting of such permission, when the record discloses no abuse of discretion. *Id.*
15. *Capital Case — Self-contradictory Evidence.* The fact that evidence given by a witness for the prosecution in a capital case was contradictory of that previously given by him and was improbable, does not warrant the Court of Appeals in reversing the judgment upon the ground that the evidence was not entitled to credit, where the credibility of the witness and the effect to be given to his evidence were clearly for the jury to determine, and the trial court, at the defendant's request, charged that if any of the witnesses had willfully testified falsely, the jury had a right to disregard such testimony even though it was not contradicted or impeached, and it is apparent that the verdict was not dependent upon that evidence. *Id.*
16. *Insanity as a Defense — Charge to Jury.* When all supposed errors in the principal charge to the jury, upon the defense of insanity, have been eliminated from the case by the court in charging as requested by the defendant, and the jury was instructed in a manner which pre-

vented any misapprehension by it as to the law controlling the question, exceptions to those portions of the principal charge will not avail on appeal. *Id.*

17. *Certified Question.* While, on an appeal by certification, the Court of Appeals is confined to the question certified, it is its duty to ascertain all the facts that raise the question, so that it can be decided as an existing issue between the parties and the danger of passing upon merely abstract propositions avoided. *Baxter v. McDonnell.* 432

18. *Demurrer to Answer — Sufficiency of Complaint.* The certified question whether the defense contained in the answer is insufficient in law upon the face thereof to constitute a defense, invokes the judgment of the Court of Appeals upon the law of the case as presented by the complaint and the answer, and requires an examination of the record to see whether the allegations of the complaint are sufficient to constitute a cause of action. *Id.*

19. *Complaint in Two Counts — General Demurrer to Defense.* When the complaint contains two counts, and the defense demurred to is general, so that it applies to either, the demurrer must be examined upon the merits unless both counts are defective; but if neither count sets forth a cause of action, the sufficiency of the pleading demurred to cannot be considered. *Id.*

20. *Argument on Sufficiency of Complaint.* Upon the certified question whether the defense contained in the answer is insufficient in law upon the face thereof to constitute a defense, the argument of counsel should include a discussion of the sufficiency of the complaint. *Id.*

21. *General Exception.* Upon an appeal to the Court of Appeals, a general exception to the findings, taken after the close of the trial, when there was no opportunity to meet the point by amendment or

otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have been successfully met and answered. *Baily v. Hornthal.* 648

22. *Appellate Division — Practice — Modification of Judgment.* When, on appeal from a judgment awarding the plaintiff a gross sum, in a common-law action upon several distinct causes of action where the amount claimed on each is definite and easily separable, it appears that the plaintiff is entitled to recover upon one cause of action, but under no circumstances could he recover upon either of the others, the Appellate Division should not reverse the judgment and order a new trial unless the plaintiff stipulates to reduce the judgment, but it should modify the judgment by making the proper reductions, and then affirm it as modified. *Freel v. Co. of Queens.* 661

23. *Judgment of Court of Appeals.* If the Appellate Division, in such a case, reverses the judgment and orders a new trial unless the plaintiff stipulates to reduce the judgment, the Court of Appeals, on appeal by the plaintiff with a stipulation for judgment absolute, can render the judgment of modification and affirmance which should have been rendered by the Appellate Division. *Id.*

24. *Reversal by Appellate Division on Facts — Review.* The power of the Appellate Division to reverse upon the facts, after a trial by the court or a referee, is limited to cases in which the findings are unsupported by testimony, or are against the weight of evidence. Where the findings are in accordance with the conceded facts or the uncontroverted testimony, the Appellate Division is not authorized to reverse upon the facts; and, if it does, a question of law is presented which the Court of Appeals may properly review. *Benedict v. Arnoux.* 715

25. *Powers of Appellate Division — Reversal — New Trial — Final Judgment.* In exercising the power

conferred upon it to reverse or affirm, wholly or partly, or to modify, the judgment appealed from, and to grant a new trial if necessary or proper (Code Civ. Pro. § 1817), and to grant to either party the judgment which the facts warrant (§ 1022), the Appellate Division, on reversing a judgment, must grant a new trial, and cannot properly render a final judgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to judgment. This rule applies to actions in equity as well as to actions at law.

Id.

See COSTS.

CRIMES, 9, 11, 20, 22, 24.

PRACTICE.

TAX, 21.

APPELLATE DIVISION.

See APPEAL, 5, 6, 10, 22, 23, 24, 25.
COURTS, 11.

SUPREME COURT, 1, 2.

APPOINTMENT (POWER OF).

See WILL, 14, 15.

APPRAISAL.

See TAX, 10, 11.

APPROPRIATIONS.

See CONSTITUTIONAL LAW, 7-10.

ARGUMENT.

See APPEAL, 20.

ASSESSMENT.

1. *Assessment for Local Improvement—Collateral Attack.* A party cannot dispute, by a collateral attack (as, by an action to set aside the

assessment upon his property and enjoin its collection), the correctness of a municipal assessment for a local improvement, where mere irregularities, or errors of a formal nature, have been committed, or where the ground of complaint is in the excess of the amount of the assessment over his due proportion. The remedy in such a case is by certiorari. *Co. of Monroe v. City of Rochester.* 570

2. *Unequal Assessment.* Proof of facts showing merely a grossly unequal assessment for a local improvement does not permit the inference that the municipal officers adopted some erroneous principle which resulted in the injustice complained of and which justifies the intervention of the court, when appealed to through an action to vacate the assessment on the plaintiff's property. *Id.*

3. *Erroneous Rule or Principle—Transgression of Jurisdiction.* To justify relief through an action to set aside an unequal local assessment on the plaintiff's property, it must appear that, in the methods pursued in making the assessment, the inequality was, or may have been, due to some erroneous rule or principle. The facts should show that the municipal officers had transgressed their jurisdiction and that, in making the assessment, they had, in fact, disregarded the ordinance or resolution from which they derived their sole authority to act. *Id.*

4. *Cloud on Title—Extrinsic Evidence.* The rule allowing equitable relief by way of removal of cloud on title, when the claim or lien purports to affect real estate and appears on its face to be valid, and the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in proceedings to enforce the lien, applies to an action which collaterally attacks a local assessment, by seeking to set it aside; but the extrinsic evidence, resorted to in such action, must show the defect relied upon to be one affecting the jurisdiction of the municipal officers. *Id.*

5. *Facts Showing Transgression of Jurisdiction by Municipal Officers.*

A case for relief, in an action to set aside a municipal assessment upon the plaintiff's property for a street opening, is made out when, in addition to facts showing that the plaintiff's assessment was excessive and unequal, it appears that whereas the ordinance of the common council described specifically a certain territory as the portion of the city which was deemed benefitted and proper to be assessed for the whole expense of the improvement, and required that the assessment should be made by the assessors upon the property described, the facts disclose that the assessors allowed themselves a latitude of authority in excess of that conferred and undertook to make exemptions with respect to the properties within the territory of assessment; that, after grading the territory into districts, they failed to apply a uniform rule in assessing the property so graded; and that they made unauthorized distinctions with respect to the uses of the properties coming under the assessment. *Id.*

See TAX, 21.

ASSIGNMENT.

1. *General Assignment — Foreign Corporations.*

A corporation of another state has power to make a general assignment for the benefit of creditors under the laws of this state, provided the assignment is also valid under the law of the domicile of the corporation. *Rogers v. Pell.* 518

2. *Power in Directors.* When neither statute nor by-law regulating the subject is shown, the power of a foreign corporation to make a general assignment resides in its directors. *Id.*

3. *President Authorized to Make Assignment.* A resolution by the board of directors of an insolvent foreign corporation, "that the company execute a general assignment," without specifically deputing any one to act, held, to au-

thorize its president to make an assignment for the company. *Id.*

4. *Selection of Assignee.*

The president of a foreign corporation, authorized by the directors to make a general assignment for the company for the benefit of its creditors, has no power to select himself as assignee, in the absence of express authority to that effect. If he does select himself without such authority, his action is not thereby rendered absolutely void, but voidable at the election of the company. *Id.*

5. *Wrongful Selection of Assignee.*

The error of the president of a foreign corporation in selecting himself as general assignee of the company, without express authority, and not questioned by the company, is not available to hostile third parties, such as judgment creditors, except to make use of it upon an application to the proper authority, for the removal of the assignee as a person unfit to discharge the duties of the trust. *Id.*

6. *Written Acknowledgment of Assignment.*

A written acknowledgment, adequate to meet the requirements of the statutes of this state relating to the subject, is a prerequisite to the passing of title to property covered by a general assignment for the benefit of creditors. *Id.*

7. *Venue of Acknowledgment — Question of Fact.*

Where the venue of an official certificate of acknowledgment of a general assignment made by a foreign corporation names one state and the testimony of an interested witness names another state as the place where the acknowledgment was taken, a question of fact is raised as to the jurisdiction of the certifying officer. *Id.*

See FRAUDULENT CONVEYANCES, 1.

ATTACHMENT.

1. *Levy — Certified Copy of Warrant.*

To effect a compliance with the provision of the statute (Code Civ.

Pro. § 649, subd. 3), that property incapable of manual delivery may be attached "by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same," the paper left as a copy of the warrant must be duly certified by the sheriff having the custody of the original warrant, over his signature, to be a copy of the original warrant. *Courtney v. Eighth Ward Bank.* 688

2. *Non-compliance with Statute.* Leaving a paper, purporting to be a copy of a warrant of attachment and indorsed "copy," and having indorsed upon another fold a notice, signed by the sheriff, that certain property "is hereby attached by virtue of the inclosed warrant," does not satisfy the statutory requirement of a certified copy of the warrant. *Id.*

ATTORNEYS.

See COURTS, 8-10.
WILL, 35.

AWARD.

See BINGHAMTON (CITY OF).
BUFFALO (CITY OF), 1-3.

BANKS.

See TAX, 12-17.

BANKING.

See BILLS, NOTES AND CHECKS, 1, 2.

BENEFICIARIES.

See TRUSTS, 2.
WILL, 5, 25.

BEQUEST.

See WILL, 2, 4, 6, 27.

BILLS, NOTES AND CHECKS.

1. *Promissory Notes — Renewal.* Whether the taking of a renewal note, by a bank, is in payment, or

merely in extension, of the obligation represented by the previous note, depends upon the intention of the parties, as manifested by the facts and circumstances attending the transaction. *In re Utica Nat. Brewing Co.* 268

2. *Avoidance of Presumption of Payment.* A conclusive finding, that there was no intention on the part of any of the parties to renewal notes taken by a bank, or on the part of the bank, to pay the former notes, or that the taking of the new notes was to have the effect of such payment, but that, on the contrary, it was the intention of all parties to extend the time of payment of the former notes by renewals thereof, destroys whatever presumption of payment might arise from the taking of the renewal notes. *Id.*

3. *Consolidated Corporation — Dissolution — Liability for Renewal Note of Constituent Corporation.* Where at the time of the consolidation of business corporations under the statute (L. 1892, ch. 691, § 8 *et seq.*), they are severally indebted to a bank upon promissory notes, and the notes mature and are renewed by notes of the same amounts and tenor after the consolidation, which new notes are held by the bank at the time of the commencement of a proceeding for the voluntary dissolution of the consolidated corporation, their payment as a claim against the consolidated corporation cannot be defeated on the ground that the taking of the renewal notes after the consolidation paid the notes which were outstanding against the constituent corporations at the time of their consolidation and discharged the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations, where it is established as a fact that the taking of the renewal notes was not intended by any of the parties to the notes or to the transaction as a payment, but merely as an extension, of the original obligations. *Id.*

4. *Judgment against Constituent Corporation.* Nor, in such case, does

the fact that the creditor bank has reduced the liability of the constituent corporations, upon the notes held by it, to judgment discharge the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations. *Id.*

5. *Unauthorized Sale of Treasury Stock by Managing Stockholder—Liability for Proceeds.* Where an agreement for the consolidation of corporations, under the statute, signed by all the stockholders, and providing for a distribution among them of the common stock and a portion of the preferred stock, provides that the rest of the preferred stock shall belong to the treasury of the consolidated corporation, to be disposed of only on the order of the board of directors, and one of the stockholders, having practical control of the consolidated corporation, sells some of its treasury stock without any resolution of the directors authorizing it, and pays a part of the proceeds over to the corporation, the payment may be deemed a recognition by him of a liability to account for the proceeds of all the treasury stock so sold by him, and warrants the setting off of the balance of such proceeds against a note made by one of the constituent corporations, held by him. *Id.*

BINGHAMTON (CITY OF).

Municipal Corporations — Action to Recover Award for Land Taken for Street — Remedy Provided by Charter. While the city of Binghamton was taking the necessary legal steps, under its charter, to pay an award for land condemned by it for street purposes into court (by reason of a contest between the original owner of the land and a person who had purchased it on a foreclosure sale after the award had become final), and on the day on which the mayor approved the resolution of the common council for such payment, the original owner began a common-law action against the city to recover the award. On the next day the award was duly

paid into court. The city charter provided a speedy and sufficient method for a judicial determination of adverse claims to awards so paid into court. *Held* (without determining under what circumstances a common-law action will lie to recover an award in the custody of a municipality), that, under the facts disclosed, the action was improperly brought, at a time when it could not be justified, and that a dismissal of the complaint, on the ground that the plaintiff's remedy was confined to the proceedings pointed out by the charter, was proper. *Patterson v. City of Binghamton.* 391

BONDS.

See CORPORATIONS, 22.
GRAVESEND (TOWN OF), 1, 4.
TAX, 17.

BOUNDARIES.

See REAL PROPERTY, 3, 4.

BRIDGES.

See COUNTIES, 1, 2.
NEGLIGENCE, 4.

BROOKLYN (CITY OF).

See GRAVESEND (TOWN OF), 1.

BUFFALO (CITY OF).

1. *Grade Crossing Act — Award for Injury for Change of Grade of Street.* Under the provisions of the Grade Crossing Act of the city of Buffalo (L. 1888, ch. 345, § 12, amd. L. 1890, ch. 255) which authorize the grade crossing commissioners to procure the appointment of commissioners of award when they have decided that the grade of a street shall be changed and that any property may be injured by the improvement "for which the owners or persons interested therein are lawfully entitled to compensation," an injury to property by change of grade of the street (as, by an overhead

viaduct) may be the subject of an award to the owners or persons interested, although the property is not actually taken. *Matter of Grade Crossing Comrs.* 550

2. "*Lawfully Entitled to Compensation.*" This is so, even on the assumption that the words "are lawfully entitled to compensation" refer to such right of compensation as was already authorized by existing laws and did not create any new right, since at the time of their enactment abutting property owners were lawfully entitled, under the city charter, to compensation for injuries caused by a change of street grade, when made by the city. *Id.*

3. *Grade Crossing Act — Commissioners of Award for Injury from Change of Grade.* Under the Grade Crossing Act of the city of Buffalo, the power to measure and determine the injury, as well as to award compensation, is vested in the commissioners appointed by the court on the application of the grade crossing commissioners; and their appointment cannot be refused on the ground that the injury to abutting property, not actually taken, by a change of street grade (as, by carrying the street over a railroad subway), is apparently slight and the damages apparently of little consequence. *Matter of Grade Crossing Comrs.* 561

BUILDING CONTRACT.

See CONTRACT, 5.

BUSINESS CORPORATIONS.

See BILLS, NOTES AND CHECKS, 3-5.

CANDIDATES.

See OFFICERS, 5.

CAPITAL.

See PARTNERSHIP, 6, 7.
TAX, 2.
TRUSTS, 2, 3.

CAPITAL STOCK.

See TAX, 3, 4.

CAUSE OF ACTION.

See BINGHAMTON (CITY OF).
HUSBAND AND WIFE.
INSURANCE, 9.

CERTIFIED COPY.

See ATTACHMENT, 1, 2.

CERTIFIED QUESTION.

See APPEAL, 17.

CERTIORARI.

See ASSESSMENT, 1.
TAX, 21.

CHALLENGE.

See CRIMES, 2.

CHANCERY (COURT OF).

See COURTS, 4, 5.

CHARGE TO JURY.

See APPEALS, 16.
CRIMES, 4, 26, 27.

CHARITABLE INSTITUTIONS.

See CORPORATIONS, 1-14.

CHARITABLE TRUST.

See WILL, 5.

CHATTEL MORTGAGE.

See FRAUDULENT CONVEYANCES,
1, 2, 4, 5.

CHILDREN.

See TAX, 19.

CIRCUMSTANTIAL PROOF.

See EVIDENCE, 1.

CITIES.

See COUNTIES, 4.

MUNICIPAL CORPORATIONS.

CLAIMS.

See INSURANCE, 1.

CLOUD ON TITLE.

See ASSESSMENT, 4.

CODE OF CIVIL PROCEDURE.

§ 15—See par. 12, this title.

1. § 649—*Attachment—Lery—Certified Copy of Warrant.* To effect a compliance with the provisions of the statute (Code Civ. Pro. § 649, subd. 3), that property incapable of manual delivery may be attached "by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same," the paper left as a copy of the warrant must be duly certified by the sheriff having the custody of the original warrant, over his signature, to be a copy of the original warrant. *Courtney v. Eighth Ward Bank.* 688

2. *Idem—Non-compliance with Statute.* Leaving a paper, purporting to be a copy of a warrant of attachment and indorsed "copy," and having indorsed upon another fold a notice, signed by the sheriff, that certain property "is hereby attached by virtue of the inclosed warrant," does not satisfy the statutory requirement of a certified copy of the warrant. *Id.*

3. § 834—*Disclosure by Physician.* Where the testimony of a physician is sought to be excluded under section 834 of the Code of Civil Procedure, the burden is upon the party seeking to exclude it to bring the case within the provisions of the section. He

must make it appear not only that the information he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act. *People v. Koerner.* 355

4. § 1000—*Exceptions Heard by Appellate Division in First Instance.* The Appellate Division of the Supreme Court is not authorized to dismiss the complaint upon the merits, upon a motion for a new trial upon exceptions ordered to be heard by it in the first instance, under section 1000 of the Code of Civil Procedure. *Matthews v. American Central Ins. Co.* 449

5. § 1022—*Appellate Division—Final Judgment on Reversal, Instead of New Trial.* Under the power possessed by the Appellate Division to grant to either party the judgment which the facts warrant, on review of a decision which does not state separately the facts found (Code Civ. Pro. § 1022), that court is not required to grant a new trial on reversing a judgment as to one of several parties, but may properly order final judgment against him when it is apparent that the facts were all disclosed and could not be changed on a new trial. *Fairchild v. Edson.* 199

See, also, par. 6, 7, this title.

6. § 1317—*Powers of Appellate Division—Reversal—New Trial—Final Judgment.* In exercising the power conferred upon it to reverse or affirm, wholly or partly, or to modify, the judgment appealed from, and to grant a new trial if necessary or proper (Code Civ. Pro. § 1317), and to grant to either party the judgment which the facts warrant (§ 1022), the Appellate Division, on reversing a judgment, must grant a new trial, and cannot properly render a final judgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to

judgment. This rule applies to actions in equity as well as to actions at law. *Benedict v. Arnoux.*

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7. § 1338 — *Presumption of Question of Law.* Where, in an action tried by the court or a referee, the decision did not state separately the facts found (Code Civ. Pro. § 1022), whether the Appellate Division, upon its review, either reverses and orders a new trial, or grants a final judgment to either party, if its order is silent as to the grounds, section 1338 controls and requires the presumption that the reversal was upon a question of law. *Bomeister v. Forster.* 229

8. *Idem* — *Amendment — Jury Trial.* The substitution of the words "a determination in the trial court" for the words "a decision of the trial court upon a trial without a jury," in section 1338 of the Code of Civil Procedure, by the amendment of 1895 (Ch. 946), did not extend the right of review by the Court of Appeals of a reversal of a judgment entered upon the verdict of a jury. *Henarie v. N. Y. C. & H. R. R. Co.* 278

9. §§ 1709, 1710 — *Replevin — Claim of Third Party to Property in Possession of Sheriff.* A third party making claim to property in the possession of the sheriff under a valid requisition in an action of replevin must assert his claim by filing the affidavit required by sections 1709 and 1710 of the Code of Civil Procedure; and no action can be maintained against the sheriff for the taking or detention by him of specific property under such circumstances except in the manner prescribed by these sections. *McCarthy v. Ockerman.* 565

10. *Idem* — *Valid Requisition — Sufficient Description.* The description of the property in the affidavit accompanying the requisition in an action of replevin is sufficient to render the requisition valid in that respect, so as to protect the sheriff from suit by a third party to recover the property, if it describes the property sufficiently to enable the sheriff to take it from

the defendant and deliver it to the plaintiff. *Id.*

11. § 2469 — *Title to Personal Property, as between Purchaser and Receiver in Supplementary Proceedings — Past-due Notes.* In determining whether the purchaser of promissory notes of a third party from a judgment debtor has a title, to the extent of the purchase money, which is protected from subjection, by relation, to the title of a receiver in supplementary proceedings, by the statutory provision which exempts from such subjection the title of a purchaser of personal property "in good faith, without notice and for a valuable consideration" (Code Civ. Pro. § 2469, subd. 4), the fact that the notes were past due is at most only a circumstance which may be considered as bearing upon the question of good faith, and the rule of the law merchant on the subject is not controlling. *Matter of Clover.* 443

12. § 2555 — *Surrogate's Court — Contempt — Imprisonment for Non-payment of Costs.* Section 2555 of the Code of Civil Procedure, authorizing the enforcement of certain decrees of a Surrogate's Court by proceedings for contempt, does not apply to decrees for the payment of costs only; and as to such a decree a surrogate is subject to the general provision of section 15, prohibiting imprisonment for non-payment of costs except in the cases specified therein. *Matter of Humfreville.* 115

§ 2603 — See par. 13, this title.

13. § 2606 — *Executor of Deceased Executor — Accounting — Delivery of Property.* The power conferred upon the Surrogate's Court by section 2606 of the Code of Civil Procedure, in connection with section 2603, to compel an executor of a deceased executor to account for unadministered money or property of the first estate in his hands and to pay and deliver the same to the Surrogate's Court, or to his successor in office, or to "such other person as is authorized by law to receive the same," does

not require the surrogate to direct payment or delivery to a legatee under the will of the first testator. *Matter of Moehring.* 423

14. *Idem* — *Person Authorized by Law to Receive.* The phrase "such other person as is authorized by law to receive the same," does not include legatees or creditors of the first testator, to whom the property will ultimately belong, but relates to such other person as is authorized by law to receive the unadministered property of the first estate for the purpose of administration. *Id.*

15. *Idem* — *Executor of Executor Cannot Distribute.* While, under section 2606 of the Code, an executor of a deceased executor can be required to deliver property in his hands to the Surrogate's Court or to a representative of the first estate, he cannot be required to act as a representative of that estate in distributing its unadministered assets. *Id.*

16. § 2672 — *Powers of Temporary Administrator.* A fire insurance policy, after a loss has occurred, is a chose in action, and a temporary administrator can collect the same and, if necessary, commence an action for that purpose (Code Civ. Pro. § 2672); and this right to collect carries with it the right to serve all such notices as the policy required, in order to make it collectible. *Matthews v. American Central Ins. Co.* 449

CODE OF CRIMINAL PROCEDURE.

1. § 388 — *Order of Proof.* Section 388 of the Code of Criminal Procedure, regulating the order of proceedings in trials, does not deprive the court of power to permit the prosecution to give evidence in aid of its original case after the defense has rested, without its being affirmatively shown that there is some good reason, in the furtherance of justice, why the evidence should be admitted at that time. *People v. Koerner.* 355

2. § 425 — *Leaving Exhibits with Jury — Clothing.* When clothing

of the deceased has been made an exhibit upon a trial for murder, and at the retirement of the jury the court inquires if there is any objection to the jury taking the "exhibits," the clothing is to be deemed included in the inquiry, as well as the papers and other articles in the case, so as to call for an objection from the defendant if he does not wish the clothing to be left with the jury. (Code Cr. Pro. § 425.) *People v. Hughson.* 153

3. § 542 — *Rejection of Competent Evidence — Reversible Error.* When the rejection of competent and material evidence is harmful to the defendant and is excepted to, it affects a substantial right and presents an error which cannot be disregarded in a criminal case, under section 542 of the Code of Criminal Procedure, but it requires a reversal even though the appellate court, with the rejected evidence before it, would still come to the same conclusion as that reached by the jury. *People v. Strait.* 165

COLONIAL GRANTS.

See RIPARIAN RIGHTS, 1, 5.

COMMISSIONERS (OF GRADE CROSSINGS).

See BUFFALO (CITY OF), 1, 3.

COMPENSATION.

See BUFFALO (CITY OF), 2.

COMPLAINT.

See APPEAL, 18-20.

CONSIDERATION.

See CONTRACT, 3.

CONSTITUTIONAL LAW.

1. *Charitable Institutions — Supervision of State Board of Charities.*

It is not necessary that an institution should be wholly charitable to fall within the provisions of the Constitution (Art. 8, §§ 11-15) and the statutes (L. 1895, chs. 754, 771) placing charitable institutions under the supervision and rules of the state board of charities. It is enough if the institution is partly charitable in its character and purpose. *People ex rel. N. Y. Inst. for Blind v. Fitch.* 14

2. *Educational and Charitable Institution.* The mere fact that an institution is partly educational does not exclude it from the provisions of the Constitution and statutes placing charitable institutions under the supervision and rules of the state board of charities. If an institution is both educational and charitable, it falls within those provisions. *Id.*
3. *Institutions for Instruction of the Blind.* The fact that institutions for the instruction of the blind are subject to the visitation of the superintendent of public instruction (L. 1894, ch. 556, tit. 15, art. 14) does not prevent such an institution from being charitable in its character and purpose, and, hence, also subject to the visitation of the state board of charities (Const. art. 8, § 13). *Id.*
4. *Meaning of "Charitable."* The word "charitable," as used in the provisions of the Constitution and the statutes subjecting charitable institutions to the supervision and rules of the state board of charities, is to be given only its usual and ordinary meaning. *Id.*
5. *Institution of Charitable Character.* The New York Institution for the Blind, being to an extent charitable as well as educational, falls within the provisions of the Constitution and statutes as an institution of a charitable character or design. *Id.*
6. *State Maintenance of Free Education.* The provision of the Constitution (Art. 9, § 1), that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated," relates only to the public or common schools of the state, and has no application to appropriations made by the state to an institution for the education of the blind, wholly or partly under private control. *Id.*
7. *State Aid to Private Education of the Blind.* Appropriations by the legislature to a local or private institution, for the education and support of the blind, are based upon and authorized by the provisions of the Constitution (Art. 8, § 10 of 1874; § 9 of 1894) which prescribe that the prohibition of state aid to any association, corporation or private undertaking shall not prevent the legislature from making such provision for the education and support of the blind as to it may seem proper. *Id.*
8. *Past Appropriations not Violative of the Constitution.* It does not follow that, if the New York Institution for the Blind is charitable, appropriations made to it in the past by the state for the education and support of pupils, and appropriations made by the counties of New York and Kings (under L. 1870, ch. 166, § 8) of the sums required for clothing the indigent pupils who were residents of the county making the appropriation, were violative of the Constitution (Art. 8, §§ 8, 11, of 1874). *Id.*
9. *Mandatory Appropriation.* The charitable character of the New York Institution for the Blind is not changed if the provisions of the statute (L. 1870, ch. 166, § 3) requiring the counties of New York and Kings to appropriate money to clothe indigent pupils is mandatory, and hence in conflict with the Constitution of 1894 (Art. 8, § 14), which is not decided. *Id.*
10. *Public Payments to Charitable Institutions.* The legislature cannot now authorize a locality to pay, nor can a locality in any case pay, its money to a charitable institution, wholly or partly under private control, for the care, sup-

- port and maintenance of inmates who are not received and retained pursuant to the rules established by the state board of charities. (Const. 1894, art. 8, § 14.) *Id.*
11. *New York and Kings Counties — County Officers — Election and Term.* The provision of the Constitution of 1894 (Art. 10, § 1), which took effect January 1, 1895, that county officers, including district attorneys, in the counties of New York and Kings, "shall be chosen by the electors once in every two or four years as the legislature shall direct," contemplated action by the legislature precedent to election and confers no authority upon the legislature as to an election consummated before legislation. *People ex rel. Eldred v. Palmer.* 133
12. *Kings County — District Attorney — Unconstitutionality of L. 1896, Ch. 772.* Chapter 772, Laws of 1896, providing that district attorneys of Kings county shall be elected once in every four years, was, in so far as it assumed to fix at four years the term of the incumbent who had been elected in November, 1895, invalid as an exercise of the power conferred by the Constitution upon the legislature to fix the term, and is, to that extent, unconstitutional and void. *Id.*
13. *Term of Office, in Absence of Legislation.* In the absence of legislation preceding their election, the terms of county officers in the counties of New York and Kings must, under the present Constitution (Art. 10, § 1; art. 12, § 3) be deemed to be two years, which, as to future cases, may be extended to four years if the legislature shall so prescribe. *Id.*
14. *Election in 1897.* The statutory and constitutional authority for holding an election for district attorney in Kings county in 1897 is ample. *Id.*
15. *Judicial Proceedings of Another State — U. S. Constitution, Art. 4, § 1.* An undisturbed adjudication by a court of another state, that a trust was created by a will, as the basis of the appointment of a trustee, is binding upon the courts of this state, in an action attacking the trusteeship, by force of the constitutional and statutory provisions requiring the courts of each state to recognize the judicial proceedings of other states (U. S. Const. art. 4, § 1; U. S. R. S. 170, § 905), providing the court had jurisdiction to make the adjudication. *Smith v. Central Trust Co.* 333
16. *Jurisdiction of Court of Appeals.* The Court of Appeals cannot review any questions of fact on appeal in a criminal case, except where the judgment is of death; nor can it review any questions relating to the sufficiency of the evidence, where the Appellate Division has affirmed a conviction, by a unanimous decision. (Const. art. 6, § 9.) *People v. Helmer.* 596
17. *Counties — Implied Powers of Boards of Supervisors.* Boards of supervisors, in the exercise of the legislative powers conferred upon them by the Constitution, are not confined in their action to the bare letter of the statute enacted to carry out the constitutional provisions, but may, in the exercise of a sound discretion, act under powers that are fairly to be implied. *People ex rel. Wakley v. McIntyre.* 628
18. *Delegated Powers of Local Legislation as to Details.* Within the limits of the power delegated to boards of supervisors by the legislature, under the authority conferred upon it by the Constitution (Art. 3, § 27) to confer, by general laws, upon the boards of supervisors of the several counties of the state "such further powers of local legislation and administration" as the legislature may deem expedient, each board of supervisors is clothed with the sovereignty of the state, and is authorized to legislate as to all details precisely as the legislature might have done in the premises. *Id.*

See OFFICERS, 2, 3.

CONSTRUCTION.

See BUFFALO (CITY OF), 2.
COURTS, 7.
WILL, 18, 28-30, 38, 42.

CONTEMPT.

See SURROGATES, 1.

CONTINGENT REMAINDER.

See WILL, 28, 29, 31, 33.

CONTRACT.

1. *Action on Oral Contract.* In an action on an oral contract within the Statute of Frauds, where the complaint does not disclose the nature of the contract, whether oral or written, the defendant must plead the statute in order to avail himself of the objection. *Matthews v. Matthews.* 288
2. *Denial of Contract.* The mere denial, in the answer, of the contract alleged in the complaint, when the character of the contract is not disclosed, does not entitle the defendant to attack the validity of the contract under the Statute of Frauds, upon the trial. *Id.*
3. *Consideration.* The breaking up of one's home, disposing of property at a sacrifice, removing to another locality, and there going into possession of another's premises and furnishing him with a home, at his request and direction, constitute a good consideration for a contract on the latter's part to convey his premises. *Id.*
4. *Action for Damages for Breach of Oral Contract to Convey Realty.* If, in an action for damages for breach of a contract to convey realty, the complaint does not disclose whether the contract was oral or written, and the answer does not set up the Statute of Frauds, no objection to proof of an oral contract, or to the validity of such a contract, under the statute, can be raised by the defendant upon the trial; and if an

oral contract, on a good consideration and to the effect alleged in the complaint, is proved, it will warrant a recovery of damages for non-performance the same as if it had been written. *Id.*

5. *Building Contract—Rights of Owner and Sub-contractor, under Order from Contractor.* If, after the owner of a building in course of construction under a contract payable in installments has accepted an order drawn by the contractor in favor of a sub-contractor, payable out of the final installment, the contractor fails to perform by the stipulated date, and the owner then makes a supplemental contract with him for performance by a new date and he again fails to perform, and the owner, having the amount of the final installment in his hands unpaid, makes payments to the contractor not due under the contract, and finally completes the work himself, as provided by the contract, he is not entitled to deduct such payments from the fund applicable to the payment of the sub-contractor for material furnished and used, although entitled to deduct from the fund the expense of completing the work. *Beardsley v. Cook.* 707
6. *Contract of Employment—Meaning of "Traveling Salesman"—Evidence of Custom.* When, on the trial of an action for breach of a written contract of employment as a traveling salesman, both parties treat the instrument as indefinite and needing explanation by extrinsic facts, and each resorts to proof of a custom in the trade construing the words "traveling salesman," it is proper for the court to leave to the jury the question as to the meaning of the controverted words, in the light of any custom that, in their judgment, may have been established. *Bloom v. Cox Shoe Mfg. Co.* 711
7. *Conversations Leading up to Contract.* When, in such an action, a question is litigated on both sides and without objection, as to conversations between the parties leading up to the written contract, concerning the duties to be per-

formed thereunder, the question may properly be submitted to the jury. *Id.*

8. *Small Sales by Employee.* If, in an action for breach of a contract of employment as a traveling salesman, the employer contends that the employee's sales were so small in comparison with his salary that he must be regarded incompetent as a salesman, it is proper for the court to instruct the jury that if the employee honestly endeavored to make sales and did not succeed, it was one of the risks the employer took in selling goods over the country. *Id.*

See CORPORATIONS, 18, 20.

EQUITY, 2, 3, 5.

GRAVESEND (TOWN OF), 3.

HUSBAND AND WIFE.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 7, 8.

CORPORATIONS.

1. *Charitable Institutions — Supervision of State Board of Charities.* It is not necessary that an institution should be wholly charitable to fall within the provisions of the Constitution (Art. 8, §§ 11-15) and the statutes (L. 1895, chs. 754, 771) placing charitable institutions under the supervision and rules of the state board of charities. It is enough if the institution is partly charitable in its character and purpose. *People ex rel. N. Y. Inst. for Blind v. Fitch.* 14
2. *Educational and Charitable Institution.* The mere fact that an institution is partly educational does not exclude it from the provisions of the Constitution and statutes placing charitable institutions under the supervision and rules of the state board of charities. If an institution is both educational and charitable, it falls within those provisions. *Id.*
3. *Institutions for Instruction of the Blind.* The fact that institutions for the instruction of the blind are subject to the visitation of the

superintendent of public instruction (L. 1894, ch. 556, tit. 15, art. 14) does not prevent such an institution from being charitable in its character and purpose, and, hence, also subject to the visitation of the state board of charities (Const. art. 8, § 13). *Id.*

4. *Meaning of "Charitable."* The word "charitable," as used in the provisions of the Constitution and the statutes subjecting charitable institutions to the supervision and rules of the state board of charities, is to be given only its usual and ordinary meaning. *Id.*

5. *Institution for the Blind — Charitable in Part.* The New York Institution for the Blind, an institution under private control, organized in 1831 (Ch. 214) for the special education of the blind, is to be regarded as a charitable institution so far as it clothes, educates and maintains indigent pupils at public expense or by donations from individuals; and as to such pupils, it is subject to the supervision and rules of the state board of charities. *Id.*

6. *Institution Educational in Part.* Such institution, so far as it educates pupils who pay for their tuition, board and maintenance, is not to be regarded as a charitable, but only as an educational institution, and as to those pupils the board of charities has no jurisdiction or power of supervision. *Id.*

7. *Institution of Charitable Character.* Such institution, being to an extent charitable as well as educational, falls within the provisions of the Constitution and statutes as an institution of a charitable character or design. *Id.*

8. *State Maintenance of Free Education.* The provision of the Constitution (Art. 9, § 1), that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated," relates only to the public or common schools of the state, and has no application to appropriations made

by the state to an institution for the education of the blind, wholly or partly under private control.

Id.

9. *State Aid to Private Education of the Blind.* Appropriations by the legislature to a local or private institution, for the education and support of the blind, are based upon and authorized by the provisions of the Constitution (Art. 8, § 10 of 1874; § 9 of 1894) which prescribe that the prohibition of state aid to any association, corporation or private undertaking shall not prevent the legislature from making such provision for the education and support of the blind as to it may seem proper. *Id.*

10. *Past Appropriations not Violative of the Constitution.* It does not follow that, if the New York Institution for the Blind is charitable, appropriations made to it in the past by the state for the education and support of pupils, and appropriations made by the counties of New York and Kings (under L. 1870, ch. 166, § 3) of the sums required for clothing the indigent pupils who were residents of the county making the appropriation, were violative of the Constitution (Art. 8, §§ 8, 11, of 1874). *Id.*

11. *Mandatory Appropriation.* The charitable character of the New York Institution for the Blind is not changed if the provisions of the statute (L. 1870, ch. 166, § 3) requiring the counties of New York and Kings to appropriate money to clothe indigent pupils is mandatory, and hence in conflict with the Constitution of 1894 (Art. 8, § 14), which is not decided. *Id.*

12. *Participation in Public School Fund.* It does not follow from the fact that the charter of Greater New York (L. 1897, ch. 378, § 1161) authorizes the board of education to distribute a ratable proportion of the school fund to every pupil in the New York Institution for the Blind, that the institution must be regarded as purely educational and not charitable. *Id.*

13. *Public Payments to Charitable Institutions.* The legislature can-

not now authorize a locality to pay, nor can a locality in any case pay, its money to a charitable institution, wholly or partly under private control, for the care, support and maintenance of inmates who are not received and retained pursuant to the rules established by the state board of charities. (Const. 1894, art. 8, § 14.) *Id.*

14. *Payment Dependent upon Observance of Rules of Board of Charities.* The New York Institution for the Blind being, to an extent, a charitable institution and, so far as it is charitable, subject to the visitation and rules of the state board of charities, no payment can be properly made to it from the moneys of the city and county of New York for the maintenance or support, including clothing, of any indigent inmate not received and retained by it pursuant to the rules of that board. *Id.*

15. *Consolidated Corporation—Dissolution—Liability for Renewal Note of Constituent Corporation.* Where, at the time of the consolidation of business corporations under the statute (L. 1892, ch. 691, § 8 *et seq.*), they are severally indebted to a bank upon promissory notes, and the notes mature and are renewed by notes of the same amounts and tenor after the consolidation, which new notes are held by the bank at the time of the commencement of a proceeding for the voluntary dissolution of the consolidated corporation, their payment as a claim against the consolidated corporation cannot be defeated on the ground that the taking of the renewal notes after the consolidation paid the notes which were outstanding against the constituent corporations at the time of their consolidation and discharged the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations, where it is established as a fact that the taking of the renewal notes was not intended by any of the parties to the notes or to the transaction as a payment, but merely as an extension, of the original obligations. *In re Utica Nat. Brewing Co.* 268

16. *Judgment against Constituent Corporation.* Nor, in such case, does the fact that the creditor bank has reduced the liability of the constituent corporations, upon the notes held by it, to judgment discharge the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations. *Id.*
17. *Concurrent Remedies.* Under the statute (L. 1892, ch. 691, § 12), the pursuit, by the creditor of a corporation which has entered into a consolidation, of a remedy against his original debtor presents no legal obstacle to an effort to collect his debt from the consolidated corporation. *Id.*
18. *Agreement between Corporations — Creditors.* The statutory liability of a consolidated corporation for the debts and liabilities of its constituent corporations, cannot be impaired by any agreement between the corporations, as to creditors who have not joined in or assented to the agreement. *Id.*
19. *Unauthorized Sale of Treasury Stock by Managing Stockholder — Liability for Proceeds.* Where an agreement for the consolidation of corporations, under the statute, signed by all the stockholders, and providing for a distribution among them of the common stock and a portion of the preferred stock, provides that the rest of the preferred stock shall belong to the treasury of the consolidated corporation, to be disposed of only on the order of the board of directors, and one of the stockholders, having practical control of the consolidated corporation, sells some of its treasury stock without any resolution of the directors authorizing it, and pays a part of the proceeds over to the corporation, the payment may be deemed a recognition by him of a liability to account for the proceeds of all the treasury stock so sold by him, and warrants the setting off of the balance of such proceeds against a note made by one of the constituent corporations, held by him. *Id.*
20. *Agreement as to Corporate Debts — Stockholders.* A provision in an agreement for the consolidation of corporations, under the statute, signed by the stockholders, to the effect that the consolidated corporation shall owe no debts on account of the constituent corporations, while it cannot affect the rights of outside creditors is a bar to the claim of a signing stockholder to payment from the assets of the consolidated corporation, in case of its insolvency, of an obligation of a constituent corporation held by him. *Id.*
21. *Action by Receiver against Delinquent Directors — Action at Law.* Where an action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law, and something more is required to warrant the intervention of a court of equity than mere allegations showing that the acts complained of are numerous and complicated, that they are difficult of ascertainment without a discovery with respect to them, and that a multiplicity of actions would be necessary if all the directors who were in office during the whole or a part of the time within which the acts complained of were committed could not be associated as defendants in one action. *Dykman v. Keeney.*
483
22. *Reorganization — Provision for Outstanding Mortgage Bonds.* Upon a reorganization of an insolvent corporation, which had bonds outstanding secured by a second mortgage on its realty, the successor corporation acquired the realty through foreclosure of a prior mortgage. By the reorganization agreement, the new company agreed to provide for the outstanding bonds by issuing new ones in their stead, at a lower rate of interest, to assenting bondholders, and by a distribution, to non-assenting bondholders, of their distributive share in the proceeds of the sale of the mortgaged property. The directors of the new company adopted a resolution, to

the effect that it assumed all the debts and obligations of the old company, "in addition to the bonds and other obligations mentioned in the agreement of reorganization," in consideration of a transfer of the old company's personal property. A bill of sale from the old company, of all its property except that covered by the mortgage, was then delivered to the new company, in which it was stated that, in consideration of such transfer, the new company assumed the payment of all the debts and obligations of the old company, excepting its mortgage bonds, and excepting all other indebtedness, otherwise provided for in the agreement of reorganization. *Held*, that the new company did not assume the payment of the old mortgage bonds. *Fernschild v. Yuengling Brewing Co.* 667

See ASSIGNMENT, 1-5, 7.
TAX, 1-4.
TRUSTS, 6, 7.

COSTS.

Imposed upon Guardian. A case for the payment of costs of appeal, by a testamentary guardian personally, is presented where the guardian has persisted in unsuccessfully litigating the right to the control of securities held by a testamentary trustee, after continuous failure in many other actions having the same object. *Smith v. Central Trust Co.* 333

See SURROGATES, 1, 2.

COUNTIES.

1. *Defective Bridge — Non-liability for Personal Injury.* A county cannot, by any rule of law as established in this state, be held liable at the suit of a private individual, who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable. *Markey v. Co. of Queens.* 675

2. *Maintenance of Bridge a Governmental Duty.* Whether the main-

tenance of highways and bridges is devolved as a duty upon the towns, or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental; and this is especially so in respect to the duty imposed by the County Law (L. 1892, ch. 686, § 68) upon the counties, of maintaining a bridge which spans navigable waters of the state, forming a boundary line between two counties. *Id.*

3. *Counties Municipal Corporations — The County Law.* The provisions of the County Law (L. 1892, ch. 686) declaring a county to be a municipal corporation (§ 2), and that an action "to recover damages for any injury to any property or rights for which it is liable" shall be in the name of the county (§ 3), import no further liability on the part of a county than that which existed at their enactment. *Id.*

4. *Distinction between Counties and Cities.* There is a distinction between counties as civil divisions of the state for purposes of local government, and chartered municipal corporations, in respect to their liability for corporate acts. This distinction was not abrogated by the County Law, and it was not intended, by the provisions of that law, that counties should be treated as upon a par with cities, when engaged in similar transactions. *Id.*

See CONSTITUTIONAL LAW, 17, 18.

COUNTY LAW.

See SESSION LAWS, 13, 29-35.

COUNTY OFFICERS.

See CONSTITUTIONAL LAW, 11-14.

COURT OF APPEALS.

See APPEAL, 2, 4, 6-9, 11, 15, 17, 18, 20, 21, 23, 24.
CONSTITUTIONAL LAW, 16.
COURTS, 6-10.

COURT RULES.

See COURTS, 6-10.

COURTS.

1. *Adjudication of Creation of Testamentary Trust.* When a court of equity, in a proceeding for that purpose, appoints a person trustee "to execute the trusts mentioned and declared" in a will, it necessarily adjudges that a trust was created by the will. *Smith v. Central Trust Co.* 333

2. *Judicial Proceedings of Another State — Jurisdiction.* An undisturbed adjudication by a court of another state, that a trust was created by a will, as the basis of the appointment of a trustee, is binding upon the courts of this state, in an action attacking the trusteeship, by force of the constitutional and statutory provisions requiring the courts of each state to recognize the judicial proceedings of other states (U. S. Const. art. 4, § 1; U. S. R. S. 170, § 905), providing the court had jurisdiction to make the adjudication. *Id.*

3. *Want of Jurisdiction.* A judgment of a court of another state is always open to impeachment for the want of jurisdiction over the subject-matter or the parties. *Id.*

4. *Jurisdiction of Subject-matter.* The Court of Chancery of New Jersey has jurisdiction of the subject-matter of the appointment of a testamentary trustee, when the fundamental question for determination is whether a trust was created by the will of a testatrix who resided in that state at the time of her death, and the beneficiaries (being her infant children) lived there, and the will was executed and proved, and the estate settled there. *Id.*

5. *Jurisdiction of Parties — Presumption.* When the record of a court of general jurisdiction of another state (such as the record of the Court of Chancery of New Jersey in a proceeding for the appointment of a testamentary trustee for infant beneficiaries) dis-

closes nothing in regard to the service of notice, and no evidence is given upon the subject, and there is nothing, either of record or otherwise, to show that every step essential to jurisdiction was not duly taken, it will be presumed that the court had jurisdiction of the persons of the parties, acquired by the service of all notices necessary. *Id.*

6. *Rules—Amendments.* The amendments of the rules of the court are analogous to the amendments of the statutes and should receive the same construction. *In re Warde.* 342

7. *Amendments—Construction.* The rule of statutory construction—that when a statute is amended by enacting that it "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, the part which remains unchanged is to be considered as having been continued the law from the time of its original enactment—applies to amendments of the rules of the court. *Id.*

8. *Rules for Admission of Attorneys—Amendments.* The amendments made December 2, 1895, to the Rules for the Admission of Attorneys, which retained unchanged the following italicized clauses in subdivision 7 of rule 6, adopted October 22, 1894: *A law student whose clerkship or attendance at a law school has already begun may, at his option, file or produce, instead of the certificates required by these rules, those required by the rules of the Court of Appeals, adopted October 28, 1892, did not have the effect of making the words "has already begun," refer to the date of the taking effect of the amendments, namely, January 1, 1896, but left them continuing to speak as of the date when they originally went into effect, namely, January 1, 1895.* *Id.*

9. *Rules of 1892.* The privilege of proceeding under the rules of 1892, conferred by subdivision 7 of present rule 6, does not apply to any law student whose clerkship

or attendance at a law school commenced after the 1st day of January, 1895, but all such students must conform to the later rules.

Id.

10. *Regents' Certificate.* A law student whose clerkship or attendance at a law school commenced after the 1st day of January, 1895, cannot be admitted to examination for admission, upon producing a regents' certificate under the rules of 1892.

Id.

11. *Exceptions Heard by Appellate Division in First Instance.* The Appellate Division of the Supreme Court is not authorized to dismiss the complaint upon the merits, upon a motion for a new trial upon exceptions ordered to be heard by it in the first instance, under section 1000 of the Code of Civil Procedure. *Matthews v. Am. Central Ins. Co.* 449

See APPELLATE DIVISION.
COURT OF APPEALS.
SUPREME COURT.
SURROGATES.

CREDITORS.

See CORPORATIONS, 18.

CREDITORS' ACTION.

See PARTNERSHIP, 8.

CRIMES.

1. *Murder — Evidence.* The evidence on a trial for wife murder by shooting held to indicate deliberation and premeditation and to support the verdict of guilty. *People v. Hughson.* 153
2. *Jury — Challenge for Bias.* The fact that a juror, on examination for service on the trial of an indictment for murder by shooting, states that he has a prejudice against a person in possession of a pistol without a permit, but that such prejudice will not influence his verdict, does not disqualify him so as to sustain a challenge for bias. *Id.*

3. *Defense of Mental Irresponsibility — Evidence — Denial of Act.* If on a trial for murder the defendant in effect admits the act, but interposes the defense that it was done when he was unconscious and not criminally responsible, declarations made in his presence immediately after the act charging him with it and denied by him are admissible against him for the purpose of characterizing his denial, as tending to show that he denied the commission of the act which he knew he had committed. *Id.*

4. *Charge to Jury — Definitions of Murder in First Degree.* Reversible error is not predicable upon the fact that the trial judge in defining murder in the first degree included the statutory provisions as to the killing of a person by an act imminently dangerous to others or committed while engaged in a felony (Penal Code, § 188), though not applicable to the case, where, although he did not in specific terms withdraw such acts from the consideration of the jury, he limited their consideration to the killing with deliberation and premeditation. *Id.*

5. *Good Character.* Good character creates a doubt against positive evidence of guilt only when, in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence. *Id.*

6. *Leaving Exhibits with Jury — Clothing.* When clothing of the deceased has been made an exhibit upon a trial for murder, and at the retirement of the jury the court inquires if there is any objection to the jury taking the "exhibits," the clothing is to be deemed included in the inquiry, as well as the papers and other articles in the case, so as to call for an objection from the defendant if he does not wish the clothing to be left with the jury. (Code Cr. Pro. § 425.) *Id.*

7. *Insanity as a Defense — Question of Intoxication Raised by Prosecution — Evidence.* If, after the defendant in a criminal action has

- reasted his defense, based upon insanity, the prosecution raises a new issue by introducing evidence tending to show that the defendant was intoxicated and that the acts and conditions relied upon by him as evidence of insanity should be attributed rather to intoxication, evidence on the part of the defendant tending to contradict the fact and theory of intoxication cannot properly be excluded on the ground that it is a reopening of the defendant's case. *People v. Strait*. 165
8. *Rebuttal of Evidence Given in Answer to Defense of Insanity*. An attempt on the part of the defendant in an action defended on the ground of insanity, to disprove the evidence of the prosecution given in answer to his proof upon the question of insanity, and upon a subject which he was not required to anticipate, is not a reopening of the defendant's case. *Id.*
9. *Rejection of Competent Evidence—Reversible Error—Code Cr. Pro. § 542*. When the rejection of competent and material evidence is harmful to the defendant and is excepted to, it affects a substantial right and presents an error which cannot be disregarded in a criminal case, under section 542 of the Code of Criminal Procedure, but it requires a reversal even though the appellate court, with the rejected evidence before it, would still come to the same conclusion as that reached by the jury. *Id.*
10. *Murder—Evidence*. The facts as to the shooting of his paramour by the defendant reviewed and held to disclose sufficient evidence of intent, deliberation and premeditation to sustain the verdict of murder in the first degree. *People v. Sutherland*. 345
11. *Conclusiveness of Verdict*. The verdict, in a capital case, is conclusive upon the Court of Appeals on questions of fact, where there is a conflict in the evidence, or where opposing inferences are to be drawn from the facts. *Id.*
12. *Appeal—Interference with Verdict*. When it appears that the facts and circumstances testified to justified the jury in finding that the homicide was intentional, and that it was the result of sufficient deliberation and premeditation to warrant the verdict of murder in the first degree, the Court of Appeals will not interfere with the determination of the jury upon the facts. *Id.*
13. *Motive*. While an adequate motive for the act is not indispensable to a conviction of murder, yet any fact from which the jury may legitimately find or infer such motive acting upon the defendant's mind is competent. *Id.*
14. *Meretricious Relations*. On a trial for the murder of a woman by a man, proof of meretricious relations between the parties and of the facts leading up to such relations is competent, where it tends to show a motive for the act. *Id.*
15. *Possession of Weapon—Intent*. On a trial for murder by shooting with a pistol, testimony that the defendant, shortly before the homicide, showed the witness the pistol, with the remark, "This means business some day," is competent as tending to prove not only that the defendant had the pistol in his possession, but that he intended to use it upon some one. *Id.*
16. *Letters from Deceased to Defendant—Motive*. On the trial of a man for murdering his paramour, who was pregnant at the time, letters received by the defendant from the woman, indicating that she considered him the father of her child and apprising him of her dependence upon him and that she considered their relations permanent, although affectionate in tone, may be admissible against him, not for the purpose of proving any fact stated in them, but as bearing upon the question whether the situation in which the defendant was placed, as depicted in the letters, furnished a sufficient motive for him to terminate the relations in the way he did. *Id.*
17. *Letters of Deceased—Evidence*. Letters of the deceased, sent to the defendant and found in his

- possession, are not, as matter of law, incompetent evidence under all circumstances, on a trial for murder, as being only statements of the deceased; but their competency depends upon their contents and the nature of the information which they convey to the mind of the accused. *Id.*
18. *Harmless Evidence.* The admission in evidence, on a trial for murder, of letters from the deceased, found in the defendant's possession, does not constitute reversible error, even if the letters contain nothing bearing upon the question of motive, unless they contain something calculated to prejudice the defendant. *Id.*
19. *Murder — Defect of Reason — Expert Testimony.* On a trial for murder, where defect of reason at the time of the act is interposed as a defense, witnesses for the prosecution, who examined the defendant on behalf of the public immediately after the homicide, when he was apparently unconscious, may testify that in their opinion he was "shamming" or "faking," when they qualify as medical experts and state the grounds of their opinions. *People v. Koerner.* 355
20. *Capital Case — Striking out Testimony — Appeal.* The striking out by the trial court of the whole testimony of a witness called by the prosecution, does not furnish a ground for the reversal of a judgment of death, when it is obvious that the substantial rights of the defendant could not have been affected by eliminating that testimony from the case and directing the jury to disregard it. *Id.*
21. *Criminal Trial — Order of Proof — Discretion of Court.* Upon the trial of a criminal action it is in the discretion of the court to permit the prosecution to give evidence in aid of its original case, after the defense has rested; and a judgment will not be disturbed on appeal, on account of the granting of such permission, when the record discloses no abuse of discretion. *Id.*
22. *Capital Case — Self-contradictory Evidence — Appeal.* The fact that evidence given by a witness for the prosecution in a capital case was contradictory of that previously given by him and was improbable, does not warrant the Court of Appeals in reversing the judgment upon the ground that the evidence was not entitled to credit, where the credibility of the witness and the effect to be given to his evidence were clearly for the jury to determine, and the trial court, at the defendant's request, charged that if any of the witnesses had willfully testified falsely, the jury had a right to disregard such testimony, even though it was not contradicted or impeached, and it is apparent that the verdict was not dependent upon that evidence. *Id.*
23. *Statement Made in Presence of Apparently Unconscious Defendant — Erroneous Admission in Evidence — Reversible Error.* On a trial for murder, in which defect of reason at the time of the act was interposed as a defense, a witness for the prosecution, who had testified as a medical expert that in his opinion the defendant was "shamming," when apparently unconscious, immediately after the homicide, was permitted to testify, over the defendant's objection, that he stated to a police officer, in the presence of the defendant and while the latter was apparently unconscious, that he "didn't see there was very much the matter with the man; that he was probably faking." *Held,* that the evidence was incompetent and improper, being mere hearsay, or the statement of the witness to a third party, unless made under such circumstances as to be binding upon the defendant; that the silence of the defendant, under the circumstances, did not raise a presumption of acquiescence in the witness's remark so as to render it competent as an admission; and that the ruling admitting the statement in evidence constituted a harmful error, calling for a reversal. *Id.*
24. *Jurisdiction of Court of Appeals.* The Court of Appeals cannot re-

view any question of fact on appeal in a criminal case, except where the judgment is of death; nor can it review any questions relating to the sufficiency of the evidence, where the Appellate Division has affirmed a conviction, by a unanimous decision. (Const. art. 6, § 9.) *People v. Helmer*. 596

25. Indictment — Penal Code, § 592.

The mere omission of the words "in respect thereto," from an otherwise sufficient indictment, based upon section 592 of the Penal Code, which makes it a crime for an officer of a corporation to knowingly exhibit a false book to any public officer authorized by law to investigate its affairs, "with intent to deceive such officer in respect thereto," does not invalidate the indictment.

Id.

26. Charge to Jury — Error.

Where the charge to the jury is erroneous, the verdict must be set aside, unless it is apparent that the error did not and could not have affected the verdict; and it is not for the defendant to show how he was injured by it, but it rests with the prosecution to show that no possible injury could have arisen from the error. *Id.*

27. Reversible Error in Charge.

On a new trial of an indictment based upon section 592 of the Penal Code, charging the president of a state bank with having knowingly exhibited a false tickler or cash book to a bank examiner, the questions most seriously litigated were whether certain entries in the book were false to the knowledge of the defendant and whether, with that knowledge, he exhibited the book to the examiner. The evidence to establish these facts was somewhat circumstantial. The trial court, in charging the jury, after detailing the evidence, added: "And, as the court at General Term had said, in this case, that was sufficient to satisfy the jury that there was an inspection or presentation of the books to the examiner." *Hill*, that this constituted reversible error. *Id.*

CUSTOM.

See CONTRACT, 6.

DAMAGES.

See BUFFALO (CITY OF), 1-3.
CONTRACT, 4.

DEBTOR AND CREDITOR.

See FRAUDULENT CONVEYANCES, 1.

DEFINITIONS.

1. "*Charitable*." The word "charitable," as used in the provisions of the Constitution and the statutes subjecting charitable institutions to the supervision and rules of the state board of charities, is to be given only its usual and ordinary meaning. *People ex rel. N. Y. Inst. for Blind v. Fitch*. 14

2. "*From and After*." The words "from and after," in a testamentary gift of a remainder, following a life estate, do not make the remainder contingent and prevent its being construed as vested, where there is nothing else on the face of the will tending to show that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator. *Hersee v. Simpson*. 496

3. "*Fraud in Law*." Fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it independently of the motive of the actor. *Delaney v. Valentine*. 692

See EXECUTORS AND ADMINISTRATORS, 2.

SESSION LAWS, 19, 25.

DEMURRER.

See APPEAL, 18, 19.

DEPOSITS.

See TAX, 15.

DESCRIPTION.

See REAL PROPERTY, 4, 7, 13.
REFLEVIN, 2.

DEVASTAVIT.

See LEGATEES, 1.

DEVISE.

See WILL, 23, 25, 30-32, 38, 39, 41.

DIRECTORS.

See ASSIGNMENT, 2.
CORPORATIONS, 21.

DISMISSAL OF APPEAL.

See APPEAL, 2.

DISTRICT ATTORNEY.

See OFFICERS, 1-4.

DOMESTIC ANIMALS.

See ANIMALS.

DONGAN CHARTER.

See RIPARIAN RIGHTS, 5.

EASEMENT.

See REAL PROPERTY, 2.

EDUCATIONAL INSTITUTIONS.

See CORPORATIONS, 1-14.

ELECTIONS.

See CONSTITUTIONAL LAW, 11, 12.
OFFICERS, 1-7.

ELIGIBILITY.

See OFFICERS, 5, 6.

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EMINENT DOMAIN.

See RAILROADS, 2.

EMPLOYMENT.

See CONTRACT, 6-8.

ENCROACHMENT.

See REAL PROPERTY, 1, 2.

EQUITABLE CONVERSION.

See PARTNERSHIP, 4, 5.

EQUITY.

1. *Restraint of Action at Law.* When a court of equity is asked to stay an action at law, it must consider whether, if it be a case where a legal defense to the action in fact exists, the applicant should be left to that as an adequate remedy, and whether any appreciable injury can result in denying him the right to establish the existence of some bar to the action at law and, thereupon, to have the same enjoined. *Bomeister v. Forster.*
229
2. *Specific Performance of Personal Contracts.* The extension of the rule of specific performance to personal contracts is justified, where there would not be a complete and satisfactory remedy by compensation in damages, or where the benefits of the contract would not inure fully to the party in whose favor it was made, unless it was specifically performed. *Id.*
3. *Restraint of Action at Law in Disregard of Contract of Settlement.* When it appears in an action in equity brought to restrain the defendant from prosecuting an action at law in breach of a lawful contract between the parties, by which the defendant had released the claim upon which the action at law was brought and had agreed not to sue thereon, that a specific performance of the contract is essential, if the plaintiff is to receive

its benefits, such as security from charges and revelations which might affect his reputation, an injunction may properly be granted.

Id.

4. *Evidence Confined to Issues on Trial.* When the issues triable in an action in equity to restrain a pending action at law are whether the defendant had executed a release of the charges on which the action at law was based and had orally agreed not to sue on the same, and whether such release and agreement were invalidated by fraud, misrepresentation or duress, evidence bearing upon the charges made in the complaint in the action at law, or bearing upon obligations claimed to arise by reason of matters set up therein, being pertinent only to the issues in that action, is not admissible in the action in equity *Id.*

5. *Oral Evidence as to Basis of Oral Contract not to Sue.* In an action in equity to restrain an action at law brought in contravention of an oral contract not to sue, sought to be avoided on the ground of fraud and duress, it is not error to permit the plaintiff to introduce oral evidence of propositions of settlement made on behalf of the defendant and which formed the basis of the contract. *Id.*

6. *Personal Money Judgment.* A court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution. *Bailey v Hornthal.* 648

See APPEAL, 25.

CORPORATIONS, 21.

JUDGMENT.

WILL, 8-11, 13.

· ERROR OF JUDGMENT.

See NEGLIGENCE, 3.

ESCHEAT.

See WILL, 33.

ESTOPPEL.

See PARTITION, 3.

EVIDENCE.

1. *Circumstantial Proof.* In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these facts. *Ruppert v. Bklyn. H. R. R. Co.* 90

2. *Defense of Mental Irresponsibility — Denial of Act.* If on a trial for murder the defendant in effect admits the act, but interposes the defense that it was done when he was unconscious and not criminally responsible, declarations made in his presence immediately after the act charging him with it and denied by him are admissible against him for the purpose of characterizing his denial, as tending to show that he denied the commission of the act which he knew he had committed. *People v. Hughson.* 133

3. *Rejection of Competent Evidence.* When the rejection of competent and material evidence is harmful to the defendant and is excepted to, it affects a substantial right and presents an error which cannot be disregarded in a criminal case under section 542 of the Code of Criminal Procedure, but it requires a reversal even though the appellate court, with the rejected evidence before it, would still come to the same conclusion as that reached by the jury. *People v. Strait.* 165

4. *Evidence Confined to Issues on Trial.* When the issues triable in an action in equity to restrain a pending action at law are whether the defendant had executed a release of the charges on which the action at law was based and had orally agreed not to sue on the same, and whether

such release and agreement were invalidated by fraud, misrepresentation or duress, evidence bearing upon the charges made in the complaint in the action at law, or bearing upon obligations claimed to arise by reason of matters set up therein, being pertinent only to the issues in that action, is not admissible in the action in equity. *Bomeisler v. Foster.* 229

5. *Oral Evidence as to Basis of Oral Contract not to Sue.* In an action in equity to restrain an action at law brought in contravention of an oral contract not to sue, sought to be avoided on the ground of fraud and duress, it is not error to permit the plaintiff to introduce oral evidence of propositions of settlement made on behalf of the defendant and which formed the basis of the contract. *Id.*

6. *Stipulation.* A stipulation by the parties to the action, that "the evidence taken upon the previous trial of the above action be read at Trial Term as the evidence in this action, and that no further evidence shall be introduced on either side outside of that which is contained in the case on appeal, determined by the General Term of this court," confers upon each the absolute right to rely upon the stipulated record as a complete record, and to take the benefit of whatever it presents as evidence. *Ryan v. Mayor, etc., of N. Y.* 328

7. *Murder.* The facts as to the shooting of his paramour by the defendant reviewed and held to disclose sufficient evidence of intent, deliberation and premeditation to sustain the verdict of murder in the first degree. *People v. Sutherland.* 345

8. *Motive.* While an adequate motive for the act is not indispensable to a conviction of murder, yet any fact from which the jury may legitimately find or infer such motive acting upon the defendant's mind is competent. *Id.*

9. *Meretricious Relations.* On a trial for the murder of a woman by a

man, proof of meretricious relations between the parties and of the facts leading up to such relations is competent, where it tends to show a motive for the act. *Id.*

10. *Possession of Weapon — Intent.*

On a trial for murder by shooting with a pistol, testimony that the defendant, shortly before the homicide, showed the witness the pistol, with the remark, "This means business some day," is competent as tending to prove not only that the defendant had the pistol in his possession, but that he intended to use it upon some one. *Id.*

11. *Letters from Deceased to Defendant — Motive.*

On the trial of a man for murdering his paramour, who was pregnant at the time, letters received by the defendant from the woman, indicating that she considered him the father of her child, and apprising him of her dependence upon him, and that she considered their relations permanent, although affectionate in tone, may be admissible against him, not for the purpose of proving any fact stated in them, but as bearing upon the question whether the situation in which the defendant was placed, as depicted in the letters, furnished a sufficient motive for him to terminate the relations in the way he did. *Id.*

12. *Letters of Deceased.*

Letters of the deceased, sent to the defendant and found in his possession, are not, as matter of law, incompetent evidence under all circumstances, on a trial for murder, as being only statements of the deceased; but their competency depends upon their contents and the nature of the information which they convey to the mind of the accused. *Id.*

13. *Harmless Evidence.*

The admission in evidence, on a trial for murder, of letters from the deceased, found in the defendant's possession, does not constitute reversible error, even if the letters contain nothing bearing upon the question of motive, unless they

contain something calculated to prejudice the defendant. *Id.*

14. *Non-expert Testimony.* The objection that the witness has not been shown to be an expert does not lie against a question which does not call for the opinion of an expert, but which relates merely to facts within the knowledge of the witness. *People v. Koerner.*

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15. *Murder — Defect of Reason — Expert Testimony.* On a trial for murder, where defect of reason at the time of the act is interposed as a defense, witnesses for the prosecution, who examined the defendant on behalf of the public immediately after the homicide, when he was apparently unconscious, may testify that in their opinion he was "shunning" or "faking," when they qualify as medical experts and state the grounds of their opinions. *Id.*

16. *Disclosure by Physician — Code Civ. Pro. § 834.* Where the testimony of a physician is sought to be excluded under section 834 of the Code of Civil Procedure, the burden is upon the party seeking to exclude it to bring the case within the provisions of the section. He must make it appear not only that the information he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act. *Id.*

17. *Insanity — Non-expert Testimony.* Upon a question of sanity or insanity, lay witnesses may be examined as to acts and conduct of the party, and upon giving such evidence they may be permitted to testify whether such acts or conduct impressed them as rational or irrational. *Id.*

18. *Criminal Trial — Order of Proof — Discretion of Court.* Upon the trial of a criminal action it is in the discretion of the court to permit the prosecution to give evidence in aid of its original case, after the defense has rested; and a judgment will not be disturbed

on appeal, on account of the granting of such permission, when the record discloses no abuse of discretion. *Id.*

19. *Order of Proof — Code Cr. Pro. § 388.* Section 388 of the Code of Criminal Procedure, regulating the order of proceedings in trials, does not deprive the court of power to permit the prosecution to give evidence in aid of its original case after the defense has rested, without its being affirmatively shown that there is some good reason, in the furtherance of justice, why the evidence should be admitted at that time. *Id.*

20. *Capital Case — Self-contradictory Evidence — Appeal.* The fact that evidence given by a witness for the prosecution in a capital case was contradictory of that previously given by him and was improbable, does not warrant the Court of Appeals in reversing the judgment upon the ground that the evidence was not entitled to credit, where the credibility of the witness and the effect to be given to his evidence were clearly for the jury to determine, and the trial court, at the defendant's request, charged that if any of the witnesses had willfully testified falsely, the jury had a right to disregard such testimony even though it was not contradicted or impeached, and it is apparent that the verdict was not dependent upon that evidence. *Id.*

21. *Proof of Insanity.* There is no authority or principle of the law of evidence which will admit proof of insanity or other disease by mere reputation in the family. *Id.*

22. *Statement by Another in Presence of Party — Admission by Acquiescence — Silence.* A party's acquiescence in the statement of another, made in his presence, to have the effect of an admission must exhibit some act of voluntary demeanor or conduct; it must plainly appear that such statement was fully known and understood by the party before any inference can be drawn from his passiveness or silence, and the

circumstances must not only be such as afforded him an opportunity to act or speak, but also such as would properly or naturally call for some action or reply from men similarly situated. *Id.*

23. *Statement Made in Presence of Apparently Unconscious Defendant — Erroneous Admission in Evidence — Reversible Error.* On a trial for murder in which defect of reason at the time of the act was interposed as a defense, a witness for the prosecution, who had testified as a medical expert that in his opinion the defendant was "shamming," when apparently unconscious, immediately after the homicide, was permitted to testify, over the defendant's objection, that he stated to a police officer, in the presence of the defendant and while the latter was apparently unconscious, that he "didn't see there was very much the matter with the man; that he was probably faking." *Held*, that the evidence was incompetent and improper, being mere hearsay, or the statement of the witness to a third party, unless made under such circumstances as to be binding upon the defendant; that the silence of the defendant, under the circumstances, did not raise a presumption of acquiescence in the witness's remark so as to render it competent as an admission; and that the ruling admitting the statement in evidence constituted a harmful error, calling for a reversal. *Id.*

24. *Competency of Statements in Presence of Defendant.* Statements in the presence of the defendant are only competent when he is in a position to hear and understand. If his condition as to consciousness is a matter of dispute, the statement in his presence is incompetent, although the People are entitled to go to the jury on the question whether the defendant was really unconscious or merely shamming. *Id.*

See ASSESSMENT, 4.
CRIMES, 1, 7.
NEGLIGENCE, 4, 8.
REAL PROPERTY, 1.

EXCEPTIONS.

See APPEAL, 2, 21.
COURTS, 11.

EXECUTORS AND ADMINISTRATORS.

1. *Executor of Deceased Executor — Accounting — Delivery of Property.* The power conferred upon the Surrogate's Court by section 2606 of the Code of Civil Procedure, in connection with section 2603, to compel an executor of a deceased executor to account for unadministered money or property of the first estate in his hands and to pay and deliver the same to the Surrogate's Court, or to his successor in office, or to "such other person as is authorized by law to receive the same," does not require the surrogate to direct payment or delivery to a legatee under the will of the first testator. *In re Moehring.* 423

2. *Person Authorized by Law to Receive.* The phrase "such other person as is authorized by law to receive the same," does not include legatees or creditors of the first testator, to whom the property will ultimately belong, but relates to such other person as is authorized by law to receive the unadministered property of the first estate for the purpose of administration. *Id.*

3. *Executor of Executor Cannot Distribute.* While, under section 2606 of the Code, an executor of a deceased executor can be required to deliver property in his hands to the Surrogate's Court or to a representative of the first estate, he cannot be required to act as a representative of that estate in distributing its unadministered assets. *Id.*

See GUARDIAN AND WARD, 1-3.
INSURANCE, 4-7, 9.
LEGATEES, 1, 2.
PRINCIPAL AND AGENT, 2.
SURROGATES, 2.
TAX, 22.
WILL, 37, 39.

EXEMPTIONS.

See TAX, 18-20.

EXHIBITS.

See CRIMES, 6.

EXPERT TESTIMONY.

See EVIDENCE, 15.

FIRE ESCAPES.

See MASTER AND SERVANT, 1.

FIRE INSURANCE.

See INSURANCE, 2-9.

FORECLOSURE.

See BINGHAMTON (CITY OF).

FOREIGN CORPORATIONS.

See ASSIGNMENT, 1-5, 7.
TAX, 1, 2, 13, 14, 16.

FOREIGN JURISDICTION.

See COURTS, 2-5.

FORMER ADJUDICATION.

See WILL, 8, 84.

FRAUD.

See FRAUDULENT CONVEYANCES, 2,
7, 8.

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. *Debtor and Creditor — Transfers
not Constituting a General Assign-*

ment. When a chattel mortgage, executed and delivered by a debtor to one of his creditors, and a transfer of business accounts to a third person, do not cover all the debtor's property and are only intended to secure the payment of debts of the mortgagee and certain other creditors mentioned therein, they are not within the statute which regulates the making of general assignments for the benefit of creditors, and prohibits preferences for more than one-third of the assigned estate (L. 1887, ch. 503). *Delaney v. Valentine.* 692

2. *Chattel Mortgage.* A chattel mortgage of a portion of his property, made by a debtor to secure some of his creditors, when his property is insufficient to pay all, executed and received in good faith, and without any fraudulent intent on the part of either of the parties, cannot properly be set aside as falling under the condemnation of the statute against fraudulent conveyances (2 R. S. 137, § 1). *Id.*

3. *Statute of Personal Uses.* The statute making transfers of personal property for the use of the grantor void as to creditors (2 R. S. 135, § 1), was intended to cover only passive trusts for the exclusive use of the grantor, or where the use of the grantor is the chief purpose, and has no application to trusts which are only incidental, and are expressed, or result, to the use of the grantor, after the exercise of the primary purpose, which is lawful. *Id.*

4. *Chattel Mortgage not Within Statute.* A chattel mortgage, given in good faith to secure the debt of the mortgagee, is not brought within the condemnation of the Statute of Personal Uses by the fact that it contains an incidental provision that any surplus, after payment of the debt, shall be returned to the mortgagee. *Id.*

5. *Mortgage to Secure Creditors Besides Mortgagee.* Nor does the Statute of Personal Uses apply to such a mortgage, although given to secure the debts of other creditors, as well as that of the mortgagee. *Id.*

6. *Transfer to Third Person.* A debtor, whose property is insufficient to pay his debts in full, can make a valid sale or pledge of a portion of it to a third person to secure a part of his creditors. *Id.*

7. *Valid Transfer.* A transfer, by a debtor whose property is insufficient to pay his debts in full, of a portion of his personal property to a third person to secure a part of his creditors, is not within the Statute of Personal Uses, when it contains no provision for returning any surplus; and if made in good faith, for the purpose of giving lawful preferences in the payment of honest debts, and so not fraudulent in fact, it is not fraudulent in law, but is valid as against other creditors. *Id.*

8. *Fraud in Law.* Fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it independently of the motive of the actor. *Id.*

FRIVOLOUS EXCEPTIONS.

See APPEAL, 2.

GENERAL TERM.

See APPEAL, 1.

GOOD CHARACTER.

See CRIMES, 5.

GRADING COMMISSIONERS.

See GRAVESEND (TOWN OF), 2, 3, 5.

GRADE CROSSINGS.

See BUFFALO (CITY OF), 1-3.

GRAVESEND (TOWN OF).

1. *Annexation to Brooklyn — Issuance of Bonds for Street Improvements.* Chapter 639, Laws of 1895, creating a commission to determine claims, and providing for the issuance of bonds, for payment for

public improvements in the late town of Gravesend, annexed to the city of Brooklyn by chapter 449, Laws of 1894, does not deprive the holder of a contract for constructing and grading a highway, executed by the town authorities before the annexation, in a proceeding pending and unfinished at the time of the passage of the act of annexation, of the right to have bonds in payment of work done by him issued by the supervisor of the town, under chapter 171, Laws of 1893, where he has not submitted his claim for determination under the act of 1895. *People ex rel. Dady v. Supr. Gravesend.* 381

2. *Construction of Neptune Avenue — Resolutions of Board of Supervisors — Appointment of Grading Commissioners for Portion of Avenue.* Land having been condemned and vested in the town of Gravesend, Kings county, for the purposes of a public highway, called Neptune avenue, between West Sixth street and old lot 47, by proceedings instituted in pursuance of a resolution of the board of supervisors under chapter 554, Laws of 1881, the board of supervisors, on June 13, 1892, provided by resolution for the grading of Neptune avenue between West Sixth street and old lot 47, but nothing was done thereunder, and on December 12, 1892, a second resolution was passed providing for the closing of the avenue between West Sixth street and West Fifteenth street, for a change of the lines, and for the opening and grading thereof between those points. Before anything was done under this resolution, and on January 30, 1893, a resolution was passed amending and rescinding in part the resolution of June 13, 1892, so that it only provided for the construction and grading of the avenue between West Fifteenth street and old lot 47. Thereupon grading commissioners for Neptune avenue, between West Fifteenth street and old lot 47, were appointed by the town supervisor, by a certificate dated February 1, 1893, and on February 26, 1893, they made a contract for the construction and grading of the avenue between those points. *Held,*

that the effect of the resolutions of December 12, 1892, and January 30, 1893, having been to so amend the resolution of June 13, 1892, as to limit the work of constructing and grading the avenue to the portion thereof between West Fifteenth street and old lot 47, it was lawful to appoint grading commissioners for that portion of the avenue. *Id.*

3. *Certificate of Appointment of Grading Commissioners—Contract for Work.* The certificate of appointment of the grading commissioners was dated February 1, 1893. The resolution of the board of supervisors of January 30, 1893, was not approved by the supervisor at large until February 2, 1893, and it was claimed that the certificate of appointment was, therefore, void. A resolution of the board of supervisors provided that grading commissioners, appointed by the supervisor of the town of Gravesend, should take an oath of office and file it with the town clerk. The grading commissioners in question took the oath of office on February 4, 1893, and filed it February 5, 1893. *Held*, that the appointment of the grading commissioners was not complete until the official oath was duly taken and filed; that as this was not done until after the resolution of January 30, 1893, had been approved by the supervisor at large, their appointment was lawful; and that the contract made by them was valid so far as affected by the regularity of that appointment. *Id.*

4. *Mandamus to Compel Issuance of Bonds—Parties.* On an application for a peremptory writ of mandamus to compel the supervisor of the town of Gravesend to issue bonds under chapter 171, Laws of 1893, in payment of work done by the relator under such contract for constructing and grading Neptune avenue, between West Fifteenth street and old lot 47, it was objected that there was a defect of parties, in that the town treasurer and clerk, who would have to join in executing the bonds, were not made parties. *Held*, that the objection was answered by the fact

that the grading commissioners had refused the relator payment, for the alleged reason that the supervisor of the town had not raised the money in the manner provided by law; and it was fair to assume that if the courts should direct the supervisor to perform his duty, the other town officials would respect the decision and obey it. *Id.*

5. *Confirmation of Report of Commissioners Opening Highway—Collateral Attack.* The contract under which the work was done for which the issuance of bonds was sought to be compelled by mandamus, was made in 1893. The report of the opening commissioners, opening the highway, was confirmed in 1896, and the confirmation had not been attacked until the present proceeding. *Held*, that the order of confirmation was in the nature of a judgment and could not be collaterally attacked at this time—none of the points urged against it being jurisdictional or such as to render the original proceeding laying out the avenue void. *Id.*

GUARDIAN AND WARD.

1. *Residuary and Specific Legatees—Action—Parties.* When, in an action brought by an administrator with the will annexed to recover from the residuary legatee moneys prematurely paid to him by a former executor, the plaintiff is made a party defendant in the capacity of guardian of the estate of an infant specific legatee, whose unpaid legacy constitutes the only claim against the testator's estate, the action is in effect the same as though the demand was at the suit of the infant, through his guardian, against the residuary legatee. *Buffalo L. T. & S. D. Co. v. Leonard.* 141

2. *Guardian's Negligence.* It seems, that in an action in which an infant, through his guardian, seeks to recover the amount of a legacy from the residuary legatee, to whom the executor had prematurely paid over funds of the estate, the infant cannot be deprived

of his remedy by the neglect of the guardian to reduce the legacy to possession when he might have done so. *Id.*

3. *Passivity of Guardian not a Defense to Residuary Legatee.* The fact that a guardian remained passive for four years, without instituting proceedings to compel an executor to account and pay over a legacy of the ward's, when the estate was known to be amply sufficient for the payments required by the will and the executor was believed to be solvent, does not constitute a defense to the residuary legatee in an action to compel him to refund to the ward moneys prematurely received from the executor. *Id.*

See COSTS.

HARLEM RIVER.

See RIPARIAN RIGHTS, 1.

HEIRS.

See PARTNERSHIP, 5.

HIGHWAYS.

See COUNTIES, 2.

GRAVESEND (TOWN OF), 1-5.
TOWNS, 1.

HOMICIDE.

See CRIMES, 1, 10, 19.

HUSBAND AND WIFE.

Money Furnished Husband by Wife—Express Contract by Husband to Repay on Contingency of Wife's Survival—Enforcement of Implied Obligation, on Annulment of Contract by Prior Death of Wife. A married woman owning real estate conveyed a parcel, on which there was an outstanding mortgage, to her husband, and to enable him to pay off the incumbrance raised the amount thereof by executing a mortgage on other property belonging to her, securing a bond which her husband signed

with her, on receiving from her husband a written agreement, signed by him alone, whereby he covenanted that if he should die before his wife, the sum raised by the wife's mortgage should be a charge upon his estate and paid as a debt owing by him, and that his estate should convey to her his interest in certain real estate (which, it was claimed, she had given to him), followed by the statement that if his wife should not survive him, the agreement should be of no effect. The husband survived the wife, and her executor sued him for the sum claimed to have been lent to him by her. *Held*, that the money furnished to the husband by the wife constituted a loan, independently of the husband's written agreement; that as that agreement had, by its terms, become of no effect through the death of the wife, the parties were remitted to such obligations as arose from the loan and failure to pay it; and, hence, that the action was maintainable and a recovery justified. *Lord v. Cronin.* 172

IMPLIED RESERVATION.

See RIPARIAN RIGHTS, 4.

IMPRISONMENT.

See SURREGATES, 1, 2.

INCOME.

See TRUSTS, 3, 4, 6, 7.

INDEFINITE BEQUEST.

See WILL, 5.

INDICTMENT.

See CRIMES, 25.

INFANTS.

See COURTS, 5.

GUARDIAN AND WARD, 1-3.
PARTITION, 6.
WILL, 35.

INHERITANCE TAX.

See TAX, 5-11, 18-20.

INJUNCTION.

See EQUITY, 1, 8.

INSANITY.

See CRIMES, 3, 7, 8, 19.
EVIDENCE, 17, 21.

INSOLVENCY.

See PARTNERSHIP, 7, 9.

INSOLVENT CORPORATIONS.

See CORPORATIONS, 20.
INSURANCE, 1.

INSURANCE.

1. *Claims against Dissolved Life Insurance Company — Date of Valuation.* Claims under policies of a life insurance company which has been dissolved for insolvency and placed in the hands of a receiver, in an action instituted by the attorney-general, must be valued and determined, and their status fixed, as of the date of the commencement of the action for dissolution, and are not affected by the death of the insured after that date and before the distribution of assets. *People v. Com. Al. L. Ins. Co.* 95

2. *Fire Insurance — Loss after Death of Original Insured — Notice and Proofs of Loss.* A policy of fire insurance which provides that the "insured" shall give "immediate notice of any loss," and "within sixty days after the fire" shall furnish proofs of loss "signed and sworn to by said insured," and that the word "insured" shall "be held to include the legal representatives of the insured," is to be considered in the light of what may reasonably be presumed to have been within the contemplation of the parties, as to the possibility of literal performance in

case of a fire occurring after the death of the original insured and before any opportunity to have a legal representative appointed by the surrogate. *Matthews v. Am. Central Ins. Co.* 449

3. *Literal Compliance with Policy Impossible — Legal Representatives of Insured.* Where literal compliance with the provisions of the policy as to giving notice and furnishing proofs of loss is impossible for the reason that no legal representative of the deceased insured had been appointed by the surrogate at the time of the fire, it is incumbent upon those interested in the policy to make reasonable efforts to see that the covenants are kept and, within a reasonable time, to use such agencies as the law provides, in order that they may be kept, if possible. *Id.*

4. *Non-appointment of Executor — Temporary Administrator.* Inability to procure the appointment of an executor of the original insured with ordinary promptness, by reason of a contest over the will, does not excuse delay in giving notice, furnishing proofs of loss, and commencing suit upon the policy, where those interested in the policy made no effort to obtain the appointment of a temporary administrator. *Id.*

5. *Powers of Temporary Administrator.* A fire insurance policy, after a loss has occurred, is a chose in action, and a temporary administrator can collect the same and, if necessary, commence an action for that purpose (Code Civ. Pro. § 2672); and this right to collect carries with it the right to serve all such notices as the policy required, in order to make it collectible. *Id.*

6. *Legal Representatives of Insured.* The assumption that the "legal representatives of the insured," referred to in the policy, included the heirs at law, next of kin, legatees and devisees, as the case may be, affords no support to a late action upon the policy, brought by an executor whose appointment had been delayed, for a loss

which occurred after the death of the original insured, in the absence of timely service of notice and proofs of loss, where it appears that upon that theory there was no time when competent persons, sustaining one or more of those relations to the decedent, with full knowledge of all the facts, could not have given the notice and furnished the proofs of loss. *Id.*

7. *Late Action upon Policy.* Evidence that notice and proof of a loss which occurred after the death of the original insured were given as required by the policy will not support an action on the policy by an executor whose appointment was delayed by a contest over the will, when the action was not begun until after the time limited for that purpose by the policy had elapsed, and no lawful reason is given for not procuring temporary administration in time to have sued within the stipulated period. *Id.*

8. *Obstacles to Performance of Conditions Precedent to Recovery upon Policy.* If there are obstacles to the performance of conditions precedent to a recovery upon an insurance policy, the party interested in the policy must make a reasonable effort to remove them. If, after due diligence, they have proved insurmountable for a time, the delay will be excusable, and performance at the earliest practicable moment thereafter will be sufficient; but to excuse non-performance it must appear that the act to be done could not, by any reasonable means, have been accomplished. *Id.*

9. *Failure of Action upon Policy.* An action to recover upon a fire insurance policy, for a loss which occurred after the death of the original insured, commenced after the lapse of the time limited for that purpose by the policy, by an executor of the original insured, whose appointment had been delayed by a contest over the will, cannot prevail, when it appears that the failure to apply for a temporary administrator and to endeavor through him to give the

notices required by the policy and essential to perfect the cause of action, and then to have suit brought therefor within the period stipulated, was absolute and without excuse. *Id.*

INTENT.

See CRIMES, 15.

INTESTACY.

See WILL, 13.

INTOXICATION.

See CRIMES, 7.

JUDGMENT.

Res Adjudicata. A judgment, in an action dealing with the validity of a will upon its face, adjudging that under a residuary clause the executors took as individual legatees certain legacies absolutely and without limit or restriction, is not a bar to an action by the legal representative of the next of kin, based upon that adjudication and invoking equity to deal with the legacies in the hands of the individual legatees, and insisting that by reason of extrinsic evidence a trust should be impressed thereon for the benefit of the representative of the next of kin. *Fairchild v. Edson.* 199

See APPEAL, 5, 22, 23, 25.

CORPORATIONS, 16.

COURTS, 1, 2.

EQUITY, 6.

GRAVESEND (TOWN OF), 5.

PARTITION, 6.

JURISDICTION.

See ASSESSMENT, 3, 5.

COURTS, 2-5.

CRIMES, 24.

PARTITION, 6.

TAX, 1.

JURY.

See CRIMES, 2, 6.

JURY TRIAL.

See APPEAL, 9.

KINGS (COUNTY OF).

See CONSTITUTIONAL LAW, 11-14.
CORPORATIONS, 10.

LAW STUDENTS.

See COURTS, 8-10.

LEGACIES.

See WILL, 2, 6, 12, 17.

LEGATEES.

1. *Residuary and Specific Legatees — Liability for Premature Payment by Executor.* If a residuary legatee receives moneys of the estate from the executor without any warrant in law or any judicial settlement of accounts, he takes with all the risks attending such a premature payment; and, on the subsequent insolvency of, and devastated by, the executor, can be compelled to refund, by the legatee of a specific money legacy which had not been paid or provided for by the executor. *Buffalo L. T. & S. D. Co. v. Leonard.* 141

2. *Liability of Residuary Legatee.* If a residuary legatee, in the absence of a judicial settlement of the accounts of the executor, receives from the executor a voluntary payment of moneys of the estate, when, as matter of fact, a legacy has not been paid or provided for, he subjects himself to the same liability to refund as would exist if he were shown to have received the money with knowledge that the legacy had not been paid or provided for. *Id.*

See GUARDIAN AND WARD, 1.

LIEN.

See WILL, 35.

LIFE ESTATE.

See TAX, 9.
WILL, 1, 19, 20, 26, 31.

LIFE INSURANCE.

See INSURANCE, 1.

LIFE TENANT.

See TRUSTS, 2.

LIMITATION OF ACTION.

See PARTITION, 5.

LIMITED PARTNERSHIP.

See PARTNERSHIP, 7-9.

LOCAL IMPROVEMENT.

See ASSESSMENT, 1-5.

MANDAMUS.

See GRAVESEND (TOWN OF), 4.

MANUFACTURING ESTABLISHMENTS.

See MASTER AND SERVANT, 1-3.

MARKETABLE TITLE.

See REAL PROPERTY, 7-13.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Manufacturing Establishments — Fire Escapes.* Screwing down the sashes in the windows adjoining the fire escapes on a manufacturing establishment, and requiring the employes to keep them closed,

in order to maintain a high temperature necessary to the work carried on, do not constitute a violation of the statute prescribing the maintenance of fire escapes embracing "windows at each story and connecting with the interior by easily accessible and unobstructed openings" (L. 1892, ch. 673, § 6), provided the sashes are so light as to be easily broken through. *Huda v. Am. Glucose Co.* 474

2. *Negligence.* Screwing down light and easily broken sashes, in windows adjoining the fire escapes on a manufacturing establishment, and requiring the employes to keep them closed, in order to maintain a high temperature necessary to the work carried on, in a building properly constructed for the purposes of its intended use, do not constitute negligence or breach of duty on the part of the employer towards those employed in the building. *Id.*

3. *Assumption of Risks.* If an employé in a manufacturing establishment subject to the statutory requirements as to fire escapes, is familiar with his employer's method in respect to escape in case of fire, and has for a long period worked under and acquiesced in the conditions under which his work is necessarily done, he must be deemed to have assumed the risks of the situation, where such method and conditions violate no statutory requirement. *Id.*

See CONTRACT, 6-8.
NEW YORK (CITY OF), 1, 2.

MENTAL IRRESPONSIBILITY.

See CRIMES, 3.

MONROE (COUNTY OF).

See TAX, 24.

MONTGOMERIE CHARTER.

See RIPARIAN RIGHTS, 5.

MORTGAGE.

See BINGHAMTON (CITY OF).
CORPORATIONS, 22.
FRAUDULENT CONVEYANCES, 1, 2, 4, 5.
PRINCIPAL AND AGENT, 2.
REAL PROPERTY, 4.

MOTIVE.

See CRIMES, 13, 16.

MUNICIPAL CORPORATIONS.

See ASSESSMENT, 1-5.
BINGHAMTON (CITY OF).
BUFFALO (CITY OF).
COUNTIES, 3, 4.
GRAVESEND (TOWN OF).
NEGLECTANCE, 5, 6.
NEW YORK (CITY OF).

MURDER.

See CRIMES, 1, 10, 19.

NAVIGATION.

See RIPARIAN RIGHTS, 8.

NEGLIGENCE.

1. *Connection of Defendant with Cause of Injury.* To entitle the plaintiff to recover in an action for a personal injury, the evidence must show that the injury was the result of some cause for which the defendant is responsible. If, upon the testimony, it is as probable that the injury resulted from the act of another as from that of the defendant, the plaintiff cannot recover. *Ruppert v. Bklyn. H. R. R. Co.* 90
2. *Obstruction in Street—Uncertainty as to Party Responsible.* A recovery against a street railroad company for a personal injury caused by a paving stone lying upon a street near the railroad track is not warranted by proof that the defendant was paving between its rails and carting stones for the purpose, where it also appears that the stone in question differed in kind from those used by the

defendant and was of the same kind as those being used by other parties in paving streets in the vicinity, and which they carted over the street in question. *Id.*

8. *Driving Horses — Error of Judgment.* If the driver of horses, in exercising his best judgment in directing their course in the emergency arising from their commencing to run away, errs, it is an error of judgment only, and is not ground for an imputation of negligence. *Benoit v. Troy & L. R. R. Co.* 223

4. *Railroads — Death of Freight Brakeman — Low Bridge — Insufficient Evidence as to Cause of Death.* In an action for damages for the death of a freight brakeman, alleged to have resulted from the negligence of the defendant railroad company in failing to provide the warning signals required by statute (L. 1884, ch. 489, § 2) to protect employees on top of cars from injury by a low bridge, *held*, that the essential fact that the death was caused by the bridge was not established by evidence that the deceased was standing apparently in good health on the top of a car just before the train passed under the bridge, which was from four feet seven inches to six feet three inches above the tops of the cars, and that immediately thereafter he was found lying on top of the same car, near the center, in a dying condition, without the production of, or the effort to procure, further evidence that he died from violence instead of disease, such as evidence tending to show a wound or a bruise upon his person. *Fitzgerald v. N. Y. C. & H. R. R. R. Co.* 263

5. *Municipal Corporations — Liability for Condition of Street.* If a city suffers the public to treat land in a laid out and partially improved but not formally opened, street as an ordinary street, it is bound to keep it in a reasonably safe condition. *Schafer v. Mayor, etc., N. Y.* 466

6. *Obstruction in Street.* Leaving a water-main manhole, with a cover projecting for several inches

above the surface, in the middle of a traveled track which the city is bound to keep in a reasonably safe condition as a street, constitutes an obstruction which will raise a question of fact as to the negligence of the city in case a traveler is injured thereby. *Id.*

7. *Contributory Negligence.* When, in an action for damages, for a death caused by the negligence of another, there is some evidence showing the exercise of reasonable care by the decedent, the fact that, owing to the circumstances, the evidence of care is weak, does not justify taking the question of contributory negligence from the jury. *Id.*

8. *Death Caused by Driving against Obstruction in Street — Evidence of Care.* In an action to recover from the city of New York damages for a death caused by the collision of the wagon driven by the decedent with a projecting manhole cover in the middle of the traveled track in an unpaved street, the evidence showed that just before striking the manhole cover, the decedent had been thrown from his seat on to the pole, in crossing the curb of an intersecting avenue, which, as partially worn down by travel, formed a part of the beaten track, about twenty feet from the manhole and very near an elevated railroad column; that in passing over the curb he was seen to get a better hold on the lines and to be in control of his horses; and that in the interval before striking the manhole cover he was balancing on the pole and struggling to keep on the wagon. *Held*, that while the evidence of care on the part of the decedent was weak, it called for a submission of the question of contributory negligence to the jury, as the jury could have found that, situated as he was, the peculiar circumstances surrounding him relieved the decedent from the exercise of greater care. *Id.*

See ANIMALS.

APPEAL, 1.

CORPORATIONS, 21.

GUARDIAN AND WARD, 2.

MASTER AND SERVANT, 2.

NEW JERSEY.

See COURTS, 4, 5.

NEW YORK (CITY OF).

1. *Discharge of Aqueduct Employee.* Undisputed evidence that, after receiving from the aqueduct commissioners a written demand for immediate resignation, an inspector of masonry upon the new aqueduct in New York city did not report for duty, or perform or offer to perform any services, but made demands for reinstatement, raises such an inference that he regarded the demand for resignation as a discharge, as to take the question from the jury, in an action for subsequent salary. *Ryan v. Mayor, etc., of N. Y.* 328

2. *Form of Discharge.* Where there is no question as to the power of the authorities to dismiss a municipal officer, it is immaterial what is the language used to effect his discharge, provided it is so understood by him. *Id.*

See CORPORATIONS, 5, 10-12, 14.
NEGLIGENCE, 8.

RIPARIAN RIGHTS, 1, 3, 5-7.

NEW YORK (COUNTY OF).

See CONSTITUTIONAL LAW, 8, 9, 11,
13.

NEW YORK INSTITUTION FOR
THE BLIND.

See CORPORATIONS, 5-8, 10-14.

NEW TRIAL.

See APPEAL, 1, 10, 25.
COURTS, 11.

NON-EXPERT TESTIMONY.

See EVIDENCE, 14, 17.

OFFICERS.

1. *District Attorney of Kings County — Term of Present Incumbent.* In

the absence of legislation preceding his election, the term of the present incumbent of the office of district attorney in Kings county, elected at the general election in November, 1895, is two years, and expires December 31, 1897; and a successor should be elected in November, 1897. *People ex rel. Eldred v. Palmer.* 183

2. *Election of 1899.* That part of the act of 1896 (Ch. 772) which prescribes a term of four years for the office of district attorney of Kings county from and after December 31, 1899, is separable, and is a valid fixing of the terms of the officers to be elected in that and subsequent years. *Id.*

3. *Election of 1897.* The term of the district attorney of Kings county, to be elected at the general election in November, 1897, will be two years, terminating December 31, 1899. *Id.*

4. *Election in 1897.* The statutory and constitutional authority for holding an election for district attorney in Kings county in 1897 is ample. *Id.*

5. *Town Supervisor — Eligibility to Office.* The disqualification imposed by the Town Law (L. 1890, ch. 569, § 50), that "no trustee of a school district shall be eligible to the office of supervisor of any town or ward in this state," applies to the capacity of a candidate for election, as well as to the holding of the office. *People v. Purdy.* 439

6. *Eligibility at Time of Election.* The intention of the statute is that the electors, in making the choice of a person for the office of supervisor, must be confined to the selection of such persons only as are not then under any legal disqualification to exercise its powers and perform its duties. *Id.*

7. *Resignation of Office of Trustee of School District.* As a trustee of a school district is incapable of being elected supervisor of a town, as well as of holding the office of supervisor, no right to that office is acquired by resigning the office

of trustee after having received a majority of the votes cast for the office of supervisor at a town meeting, and before qualifying as supervisor. *Id.*

See CONSTITUTIONAL LAW, 11.
GRAVESEND (TOWN OF), 2, 3, 4.

ORAL CONTRACT.

See CONTRACT, 1-4.

ORAL EVIDENCE.

See EVIDENCE, 5.

ORDER OF PROOF.

See EVIDENCE, 18, 19.

PARENT AND CHILD.

See TAX, 18-20.

PARTIES.

See COURTS, 5.
GRAVESEND (TOWN OF), 4.
GUARDIAN AND WARD, 1.

PARTITION.

1. *Referee's Deed.* If a referee's deed in partition covers premises other than those described in the complaint and directed by the decree to be sold, it is without authority and passes no title to the purchaser. *Heller v. Cohen.* 299
2. *Vendor and Purchaser — Marketable Title — Material Defects.* The title of the vendor of land is not a marketable one, and he cannot compel the purchaser to accept it, where it is based, as to a portion of the premises, upon a description in a referee's deed in partition which covers premises other than those described in the decree of sale, and as to another portion he shows no record title, and it is found as an inference, not opposed to the weight of evidence, from special facts and circumstances, that such defects are material. *Id.*

3. *Estoppel.* There is no principle by which the unknown act of a referee in partition, in describing in his deed other premises than those described in the complaint and decree, estops the parties to the partition action from disputing the correctness of the deed; and a marketable title in the grantee of such a deed cannot be based upon any such estoppel. *Id.*

4. *Correction of Defects in Title.* The purchaser of real estate from one whose title is based upon a judicial sale is entitled to a marketable title, free from reasonable doubt, and is in nowise bound to remedy it by proceedings to correct defects in the judicial sale. *Id.*

5. *Limitation of Action — Infancy.* The plaintiffs in an action of partition, brought by the heirs of a deceased partner, claiming title to his original undivided interest in partnership lands, which he had deeded to his copartner for partnership purposes, were infants at the death of their decedent, and the action was not commenced until thirty years after his death, nor until fifteen years after the younger of the plaintiffs became of age. *Held* (following *Hovell v. Leavitt*, 95 N. Y. 617), that the plaintiffs, although they had slumbered upon their rights during an adverse possession of twenty-seven years, were not barred by the Statute of Limitations. *Darrow v. Calkins.* 503

6. *Jurisdiction — Infants.* When service of summons upon infant defendants in partition is by publication, the court acquires no jurisdiction to appoint a guardian *ad litem* or to render a judgment binding upon them as parties, prior to the expiration of the period of publication. *Id.*

7. *Conversion of Partnership Realty into Personality — Effect upon Heirs of Deceased Partner.* One of two partners deeded to the other the grantor's undivided interest in partnership land, which had been purchased by them as copartners with partnership funds. The deed declared that the land was to be held by the grantee as partnership

property, contained a power of management and sale, and stated that the grantee was to "pay over" to the grantor, "his heirs and assigns or other legal representatives, such portion thereof as shall at the closing of the partnership business belong to or be due or coming to" the grantor, "his heirs, executors, assigns or other legal representatives." *Held*, that the deed did not contravene the Statute of Uses and Trusts; that it disclosed an intention of the partners, and hence operated, to convert the land into personalty and to substitute in place of the grantor's prior interest in the land as such an interest in him and his representatives in any surplus which should remain after a sale by the grantee and the adjustment of the partnership affairs; and that, on the death of the grantor, a decree adjusting the partnership affairs and adjudicating the claim of the estate of the grantor in the partnership assets at a certain sum, in an action brought by his administratrix, was binding upon the grantor's heirs, not as parties to the action, but from the character of the property, as between them and the grantee or his representatives, and precluded them from maintaining an action to partition the land. *Id.*

PARTNERSHIP.

1. *Character of Realty.* In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property, between the partners themselves and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. *Darrow v. Calkins*, 503

2. *Character of Partnership Realty.*

To the extent necessary for the purposes of partnership equities, the character of partnership real estate, in the absence of any agreement, express or implied, between the partners to the contrary, is to be deemed, in equity, changed into personalty; but the portion of the land not required for such equities retains its character as realty, and is subject to the ordinary operation of the laws of inheritance and descent. *Id.*

3. *Intention of Partners.* Where it appears, by the express or implied agreement of the partners, that it was their intention that partnership lands should be treated and administered as personalty for all purposes, effect will be given thereto. *Id.*

4. *Conversion into Personalty.* Real estate purchased for partnership purposes with partnership funds, and used in the partnership business, may be deemed absolutely converted into personalty for all purposes, on the ground of intention. *Id.*

5. *Conversion of Partnership Realty into Personalty — Effect upon Heirs of Deceased Partner.* One of two partners deeded to the other the grantor's undivided interest in partnership land, which had been purchased by them as copartners with partnership funds. The deed declared that the land was to be held by the grantee as partnership property, contained a power of management and sale, and stated that the grantee was to "pay over" to the grantor, "his heirs and assigns or other legal representatives, such portion thereof as shall at the closing of the partnership business belong to or be due or coming to" the grantor, "his heirs, executors, assigns or other legal representatives." *Held*, that the deed did not contravene the Statute of Uses and Trusts; that it disclosed an intention of the partners, and hence operated, to convert the land into personalty and to substitute in place of the grantor's prior interest in the land as such an interest in him and his representatives in any surplus which should

remain after a sale by the grantee and the adjustment of the partnership affairs; and that, on the death of the grantor, a decree adjusting the partnership affairs and adjudicating the claim of the estate of the grantor in the partnership assets at a certain sum, in an action brought by his administratrix, was binding upon the grantor's heirs, not as parties to the action, but from the character of the property, as between them and the grantee or his representatives, and precluded them from maintaining an action to partition the land. *Id.*

6. *Withdrawal of Capital.* The doctrine that a partner who retires from an insolvent firm and withdraws from it a sum of money as his share of the contributed capital is defrauding the creditors of the firm, applies with the same force to a limited as to a general partnership. *Baily v. Hornthal.*

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7. *Insolvent Limited Partnership—Return of Capital to Special Partner.* If a limited partnership was insolvent at its termination, and a succeeding general partnership and the general partners have been since continually insolvent, a special partner cannot retain the capital that he had contributed to the firm, when voluntarily paid back to him by the general partners after they had become insolvent, as against judgment creditors of the general partners whose claims were in existence when the payment was made, at least in the absence of an agreement made in good faith, in ignorance of the fact of insolvency and without knowledge of such facts as would put a prudent man upon inquiry.

Id.

8. *Creditors' Action.* An action in equity lies at the suit of judgment creditors, with executions returned unsatisfied, of the general partners in a terminated insolvent limited partnership, organized under the laws of Texas, and in a succeeding general partnership, to reach a specific fund in the hands of a special partner, upon the theory that he had no right to the same, as against the creditors of the

judgment debtors, because he received it, under the designation of returned capital, from the debtors virtually as a gift when they were insolvent. *Id.*

9. *Evidence of Insolvency.* The evidence examined and held to support the conclusion of the courts below (the facts having been found by the trial court and confirmed by a late General Term), that a limited partnership, which had been succeeded by a general partnership which failed seven months after the termination of the limited partnership, was insolvent at its termination. *Id.*

PAYMENT.

See *BILLS, NOTES AND CHECKS*, 2.

PENAL CODE.

1. § 183—*Charge to Jury—Definitions of Murder in First Degree.* Reversible error is not predicable upon the fact that the trial judge in defining murder in the first degree included the statutory provisions as to the killing of a person by an act imminently dangerous to others or committed while engaged in a felony (Penal Code, § 183), though not applicable to the case, where, although he did not in specific terms withdraw such acts from the consideration of the jury, he limited their consideration to the killing with deliberation and premeditation. *People v. Hughson.* 153

2. § 592—*Indictment.* The mere omission of the words "in respect thereto," from an otherwise sufficient indictment, based upon section 592 of the Penal Code, which makes it a crime for an officer of a corporation to knowingly exhibit a false book to any public officer authorized by law to investigate its affairs, "with intent to deceive such officer in respect thereto," does not invalidate the indictment. *People v. Helmer.* 596

3. *Idem—Reversible Error in Charge.* On a new trial of an indictment based upon section 592 of the Penal Code, charging the presi-

dent of a state bank with having knowingly exhibited a false tickler or cash book to a bank examiner, the questions most seriously litigated were whether certain entries in the book were false to the knowledge of the defendant and whether, with that knowledge, he exhibited the book to the examiner. The evidence to establish these facts was somewhat circumstantial. The trial court, in charging the jury, after detailing the evidence, added: "And, as the court at General Term had said, in this case, that was sufficient to satisfy the jury that there was an inspection or presentation of the books to the examiner." *Held*, that this constituted reversible error. *Id.*

PERFORMANCE.

See INSURANCE, 2, 8.

PERSONAL INJURY.

See COUNTIES, 1.

NEGLIGENCE, 1, 2, 4, 6-8.

PERSONAL PROPERTY.

Title to Personal Property, as between Purchaser and Receiver in Supplementary Proceedings—Past-due Notes—Code Civ. Pro. § 2469. In determining whether the purchaser of promissory notes of a third party from a judgment debtor has a title, to the extent of the purchase money, which is protected from subjection, by relation, to the title of a receiver in supplementary proceedings, by the statutory provision which exempts from such subjection the title of a purchaser of personal property "in good faith, without notice and for a valuable consideration" (Code Civ. Pro., § 2469, subd. 4), the fact that the notes were past due is at most only a circumstance which may be considered as bearing upon the question of good faith, and the rule of the law merchant on the subject is not controlling. *In re Clover*. 443

See PARTNERSHIP, 4, 5.

POWERS.

WILL, 14, 15, 22, 27.

PHYSICIANS.

See EVIDENCE, 16.

PLEADING.

1. *Statute of Frauds.* The defense of the Statute of Frauds, to be available, must be pleaded. *Matt-hews v. Matthews*. 288
2. *Action on Oral Contract.* In an action on an oral contract within the Statute of Frauds, where the complaint does not disclose the nature of the contract, whether oral or written, the defendant must plead the statute in order to avail himself of the objection. *Id.*
3. *Denial of Contract.* The mere denial, in the answer, of the contract alleged in the complaint, when the character of the contract is not disclosed, does not entitle the defendant to attack the validity of the contract under the Statute of Frauds, upon the trial. *Id.*

See APPEAL, 18-20.

POWER OF APPOINTMENT.

See APPOINTMENT (POWER OF).

POWER OF SALE.

See SALE (POWER OF).

POWERS.

Personal Property. The provisions of the Revised Statutes in regard to powers apply as well to powers concerning personal property as to those affecting real estate. *In re Moehring*. 423

PRACTICE.

Non-submission of Question of Fact— Where a material question of fact is raised by the evidence on a jury trial and the defendant asks to go to the jury thereon, but the court directs a verdict for the plaintiff, and retains the case for further consideration under a stipulation which does not authorize the decision of any question of fact, and

thereafter, without having made any findings, grants a motion for a new trial made by the defendant upon the minutes and also dismisses the complaint, subject to an exception taken by the plaintiff and ordered to be heard at General Term in the first instance, the action of the trial court is in effect a nonsuit; and if the General Term overrules the exception and directs judgment for the defendant accordingly, the plaintiff may, on appeal, properly claim error from the failure to submit to the jury any material question of fact raised by the evidence, and may obtain a new trial on that ground. *Rogers v. Pell.* 518

See APPEAL, 22.

PREFERENCES.

See FRAUDULENT CONVEYANCES, 1.

PREMIUM.

See TRUSTS, 3-5.

PRESUMPTION.

See APPEAL, 6.
COURTS, 5.

PRINCIPAL AND AGENT.

1. *When Agent's Knowledge not Imputable to Principal.* When an agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, the presumption that he has disclosed all the facts that have come to his knowledge does not prevail, and his knowledge is not imputable to his principal. *Benedict v. Arnoux.* 715
2. *Testamentary Power of Sale — Improper Exercise of, by Executors, Promoted by Agent of Another, for His Own Benefit — Principal not Chargeable with Constructive Knowledge.* If a power given by a will to the executors is that of sale and does not include a power

to mortgage, and an agent, holding, in his own right, a judgment against the estate, which he is interested in having paid, and having in his hands money of his principal for investment, arranges with the executors that they shall deed land of the estate to a third party, for the purpose of having it mortgaged by the grantee to the principal, and thus obtain the principal's money and turn it over to the executors for the benefit of the estate and of the agent, and the arrangement is carried out, the principal, having no actual knowledge of the arrangement, is not constructively chargeable with the agent's knowledge, even if the arrangement constitutes a scheme to evade the will and renders the deed a mortgage; and the principal is not precluded thereby from enforcing the mortgage executed to him by the grantee of the executors' deed, where the latter instrument, as recorded, is upon its face an absolute deed, for a full consideration, and apparently within the power conferred by the will. *Id.*

PROCEDURE.

See TAX, 25.

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.
PERSONAL PROPERTY.

PUBLIC IMPROVEMENTS.

See ASSESSMENT, 1-5.
RIPARIAN RIGHTS, 2-4, 7.

PUBLIC SCHOOL FUND.

See CORPORATIONS, 12.

QUESTION OF FACT.

See APPEAL, 4.
ASSIGNMENT, 7.
CONTRACT, 6.
PRACTICE.
REAL PROPERTY, 8.
SUPREME COURT, 2.

QUESTION OF LAW.

See APPEAL, 6, 24.

NEW YORK (CITY OF), 1.

RAILROADS.

1. *Death of Freight Brakeman — Low Bridge — Insufficient Evidence as to Cause of Death.* In an action for damages for the death of a freight brakeman, alleged to have resulted from the negligence of the defendant railroad company in failing to provide the warning signals required by statute (L. 1884, ch. 439, § 2) to protect employees on top of cars from injury by a low bridge, *held*, that the essential fact that the death was caused by the bridge was not established by evidence that the deceased was standing apparently in good health on the top of a car just before the train passed under the bridge, which was from four feet seven inches to six feet three inches above the tops of the cars, and that immediately thereafter he was found lying on top of the same car, near the center, in a dying condition, without the production of, or the effort to procure, further evidence that he died from violence instead of disease, such as evidence tending to show a wound or a bruise upon his person. *Fitzgerald v. N. Y. C. & H. R. R. Co.* 263
2. *Street Surface Railroads — Proceeding to Acquire Use of Connecting Tracks.* The requirement of the Railroad Law which, by virtue of section 91, compels a street surface railroad company to obtain the consents of the local authorities and abutting owners to such use before it can apply to acquire the right to use the connecting track of another company by a proceeding *in invitum* under section 102 of that law, is absolute and does not depend upon what the defendant company might have the power to voluntarily agree to. *Colonial City Tr. Co. v. K. C. R. R. Co.* 493

See BUFFALO (CITY OF), 1.

REAL PROPERTY.

1. *Encroachment of Building — Evidence.* The evidence as to the fact of encroachment upon adjacent premises by a building examined and *held* to support a finding that there was no encroachment. *Katz v. Kaiser.* 294
2. *Encroachment — Common Ownership — Easement.* If the owner of a lot on which there is a building whose wall encroaches upon the adjoining lot acquires title to the adjoining lot, the encroachment ceases; and if he subsequently severs the title to the lots, the adjoining lot is charged with the servitude of the wall, and the title to the dominant lot is not open to the objection that it encroaches upon the adjoining lot. *Id.*

Practical Location of Boundaries. A practical location of boundaries, which has been acquiesced in for a long series of years, will not be disturbed. *Id.*
4. *Variance in Descriptions — Boundaries Confirmed by Practical Location and Covenants in Mortgage.* If the owner of a lot makes a practical location of its side boundaries by erecting a building which covers its entire width as described in his deed, and thereafter executes a mortgage, with covenants, intended to cover the entire lot, but which for some unexplained reason describes it as a few inches narrower than described in his deed, such practical location, and the covenants in the mortgage, may be successfully invoked, as against the original owner and mortgagor and his heirs, to extend to the entire original lot a title acquired through a foreclosure sale, after the practical location has been acquiesced in for between thirty and forty years. *Id.*
5. *Specific Performance.* Rules governing the enforcement of specific performance of contracts for the sale of land collated. *Heller v. Cohen.* 299
6. *Partition — Referee's Deed.* If a referee's deed in partition covers premises other than those de-

- scribed in the complaint and directed by the decree to be sold, it is without authority and passes no title to the purchaser. *Id.*
7. *Vendor and Purchaser — Marketable Title — Material Defects.* The title of the vendor of land is not a marketable one, and he cannot compel the purchaser to accept it, where it is based, as to a portion of the premises, upon a description in a referee's deed in partition which covers premises other than those described in the decree of sale, and as to another portion he shows no record title, and it is found as an inference, not opposed to the weight of evidence, from special facts and circumstances, that such defects are material. *Id.*
8. *Materiality of Defect in Title — Question of Fact.* The question as to the materiality of a defect in the offered title, in an action for specific performance, is one of fact when it depends upon, and is an inference to be drawn from, circumstances; and the Appellate Division is not authorized to reverse a decision of the trial court upon such question of fact, where there is no such preponderance of proof against the result reached by it as discloses, with reasonable certainty, that its conclusion was erroneous, or against the weight of evidence. *Id.*
9. *Estoppel.* There is no principle by which the unknown act of a referee in partition, in describing in his deed other premises than those described in the complaint and decree, estops the parties to the partition action from disputing the correctness of the deed; and a marketable title in the grantee of such a deed cannot be based upon any such estoppel. *Id.*
10. *Correction of Defects in Title.* The purchaser of real estate from one whose title is based upon a judicial sale is entitled to a marketable title, free from reasonable doubt, and is in nowise bound to remedy it by proceedings to correct defects in the judicial sale. *Id.*
11. *Adverse Possession.* The mere fact that the vendor and his predecessor in title had been in the undisturbed possession of the premises described in a contract of sale for more than twenty years, without proof that the entry was under a particular conveyance, exclusive of any other right, does not of itself warrant a determination that their title has become perfect through adverse possession under a written conveyance, as against the true owner. *Id.*
12. *Title Subject to Litigation.* The purchaser of real estate ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation where the title may depend upon a question of fact, as, where he would be required to resort to parol evidence to sustain the vendor's title by adverse possession. *Id.*
13. *Variance in Description of Land.* A variance in the description of land in instruments essential to the title, such as between stating the place of beginning in one as the "northwest" corner of certain streets and in the other as the "southwest" corner, cannot be disregarded or changed, in support of an offered title, in an action to compel the purchaser to perform his contract, where there is no sufficient description in the instrument sought to be changed to plainly indicate the property intended and also to show that there is an error in the description which may be disregarded and the property still clearly identified. *Id.*

See HUSBAND AND WIFE.
PARTNERSHIP, 1, 2, 5.
RIPARIAN RIGHTS, 4, 6.
WILL, 22.

RECEIVER.

See CORPORATIONS, 21.
INSURANCE, 1.
PERSONAL PROPERTY.

REGENTS' CERTIFICATE.

See COURTS, 10.

RELEASE.

See EQUITY, 3, 4.
WILL, 33.

REMAINDERS.

See TRUSTS, 2.
WILL, 19, 20, 26, 28, 30, 32, 33.

REMEDIES.

See ASSESSMENT, 1.
BINGHAMTON (CITY OF).
CORPORATIONS, 17.
EQUITY, 1.

RENEWAL.

See BILLS, NOTES AND CHECKS, 1.

REORGANIZATION.

See CORPORATIONS, 22.

REPLEVIN.

1. *Claim of Third Party to Property in Possession of Sheriff.* A third party making claim to property in the possession of the sheriff under a valid requisition in an action of replevin must assert his claim by filing the affidavit required by sections 1709 and 1710 of the Code of Civil Procedure; and no action can be maintained against the sheriff for the taking or detention by him of specific property under such circumstances except in the manner prescribed by these sections. *McCarthy v. Ockerman.* 565
2. *Valid Requisition — Sufficient Description.* The description of the property in the affidavit accompanying the requisition in an action of replevin is sufficient to render the requisition valid in that respect, so as to protect the sheriff from suit by a third party to recover the property, if it describes the property sufficiently to enable the sheriff to take it from the defendant and deliver it to the plaintiff. *Id.*

REQUISITION.

See REPLEVIN, 2.

RES ADJUDICATA.

See JUDGMENT.

RESIDUARY LEGATEE.

See LEGATEES, 1, 2.

REVISED STATUTES.

1. 1 R. S. 726, § 40 — *Eventual Estate.* The rule, that rents and profits undisposed of during a valid limitation of an expectant estate shall belong to the persons presumptively entitled to the next eventual estate (1 R. S. 726, § 40), applied. *Matter of Tompkins.* 634
2. 1 R. S. 727, § 44 — *Legacy as Tenancy in Common — Secret Trust — Promise by one Legatee Only.* When a bequest to executors personally and absolutely is not declared by the instrument to be in joint tenancy it must be deemed to be a tenancy in common (1 R. S. 727, § 44); and in case one of such legatees has by a promise, express or implied, to comply with the testator's wishes, impressed his share of the bequest with an unlawful and void secret trust, the shares of the other legatees are not affected thereby, but constituted upon its face an absolute gift to the executors as individuals, and hence was valid. *Fairchild v. Edson.* 199
3. 1 R. S. 729, §§ 60, 61 — *Alienable Estate.* The grantee of lands devised subject to the execution of a trust has a legal estate against all persons except the trustee (1 R. S. 729, §§ 60, 61); and such an estate is alienable, subject to the execution of the trust. *Matter of Tompkins.* 634
4. 1 R. S. 781 — *Powers — Personal Property.* The provisions of the Revised Statutes in regard to powers apply as well to powers con-

- cerning personal property as to those affecting real estate. *Matter of Moehring*. 423
5. 1 R. S. 773, § 1 — *Will — Power of Appointment — Suspension of Ownership*. In applying the statutory rule as to the suspension of the absolute ownership of personal property (1 R. S. 773, § 1), the provisions of a will which attempt to execute a power of appointment conferred by will must be tested by reading them into the will which created the power. *Fargo v. Squiers*. 250
6. 2 R. S. 57, § 4 — *Devises to Aliens*. See *McGillis v. McGillis*. 532
7. 2 R. S. 135, § 1 — *Statute of Personal Uses*. The statute making transfers of personal property for the use of the grantor void as to creditors (2 R. S. 135, § 1), was intended to cover only passive trusts for the exclusive use of the grantor, or where the use of the grantor is the chief purpose, and has no application to trusts which are only incidental, and are expressed, or result, to the use of the grantor, after the exercise of the primary purpose, which is lawful. *Delaney v. Valentine*. 662
8. *Idem — Chattel Mortgage not Within Statute*. A chattel mortgage, given in good faith to secure the debt of the mortgagee, is not brought within the condemnation of the Statute of Personal Uses by the fact that it contains an incidental provision that any surplus, after payment of the debt, shall be returned to the mortgagor. *Id.*
9. *Idem — Mortgage to Secure Creditors Besides Mortgagee*. Nor does the Statute of Personal Uses apply to such a mortgage, although given to secure the debts of other creditors as well as that of the mortgagee. *Id.*
10. *Idem — Valid Transfer*. A transfer, by a debtor whose property is insufficient to pay his debts in full, of a portion of his personal property to a third person to secure a part of his creditors, is not within the Statute of Personal Uses, when it contains no provision for returning any surplus; and if made in good faith, for the purpose of giving lawful preferences in the payment of honest debts, and so not fraudulent in fact, it is not fraudulent in law, but is valid as against other creditors. *Id.*
11. 2 R. S. 137, § 1 — *Fraudulent Conveyances — Chattel Mortgage*. A chattel mortgage of a portion of his property, made by a debtor to secure some of his creditors, when his property is insufficient to pay all, executed and received in good faith, and without any fraudulent intent on the part of either of the parties, cannot properly be set aside as falling under the condemnation of the statute against fraudulent conveyances (2 R. S. 137, § 1). *Id.*

REVISED STATUTES (UNITED STATES).

§ 905 — *Judicial Proceedings of Another State*. An undisturbed adjudication by a court of another state, that a trust was created by a will, as the basis of the appointment of a trustee, is binding upon the courts of this state, in an action attacking the trusteeship, by force of the constitutional and statutory provisions requiring the courts of each state to recognize the judicial proceedings of other states (U. S. Const. art. 4, § 1; U. S. R. S. 170, § 905), providing the court had jurisdiction to make the adjudication. *Smith v. Central Trust Co.* 333

RIPARIAN RIGHTS.

1. *New York City — Colonial Riparian Grant*. The grant made by Governor Nichols in 1667, conveying to the inhabitants and freeholders of the village of New Harlaem, on Manhattan island, certain lands bounded therein by the Harlem river, conveyed only to high-water mark; and, hence, the grantees took title to the uplands only, and became simply riparian proprietors upon naviga-

ble tidewater. *Sage v. Mayor, etc., of N. Y.* 61

2. *Public Improvements — Riparian Owners.* As against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater. *Id.*

3. *Improvement of Water Front.* The city of New York has absolute power to improve the water front of Manhattan island for the benefit of navigation, free from any interference by the riparian owner, whose sole right against the state or its municipal grantee, as the trustee for the public, is the pre-emptive right to purchase, in case of sale, when conferred by statute. *Id.*

4. *Grant of Riparian Lands — Implied Reservation.* In every grant of lands bounded by navigable tideswaters, made by the crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. *Id.*

5. *Colonial Charters.* The Dongan and Montgomerie charters, ratified and confirmed by the State Constitution of 1777, vested in the city of New York the absolute title to all the surrounding land between high and low-water mark. *Id.*

6. *Title to Made Land.* Land made by the city of New York in rightfully filling up the water front and constructing piers, under its ancient charters and subsequent constitutional legislation, does not become the property of the riparian owner through the doctrine of accretion, but remains the property of the city for the benefit of the public. *Id.*

7. *Subordination of Riparian Rights.* The riparian rights of an owner of Harlem upland are subordinate to the right of the city of New York, under its ancient charters supplemented by constitutional legislation and state grants, to fill

in and make improvements, such as an exterior street, docks and bulkheads, from the high-water mark in front of his upland to and below low-water mark, essential to navigation and commerce, without compensation. *Id.*

RULES.

See COURTS, 6-10.

SALE (POWER OF).

See PRINCIPAL AND AGENT, 2.
WILL, 21.

SALES.

See CORPORATIONS, 19.
PERSONAL PROPERTY.

SAVINGS BANKS.

See TAX, 12-17.

SCHOOL DISTRICT.

See OFFICERS, 7.

SECRET TRUST.

See WILL, 9-13.

SESSION LAWS.

1. 1831, *Ch.* 214 — *Institution for the Blind.* The New York Institution for the Blind, an institution under private control, organized in 1831 (*Ch.* 214) for the special education of the blind, is to be regarded as a charitable institution so far as it clothes, educates and maintains indigent pupils at public expense or by donations from individuals; and as to such pupils, it is subject to the supervision and rules of the state board of charities. *People ex rel. N. Y. Inst. for the Blind v. Fitch.* 14
2. 1848, *Ch.* 319 — *Society of St. Johnland.* Chapter 562 of Laws of 1872, amending the charter of the Society of St. Johnland, a charitable

- society incorporated under chapter 319 of Laws of 1848, does not exempt the society from the general provision of the act of 1848 rendering charitable bequests void when made within two months of the testator's death. *Fairchild v. Edson*. 199
3. *Idem* — *Secret Trust in Circumvention of L. 1848, Ch. 319*. A secret trust which has for its object the circumvention of the statute (L. 1848, ch. 319) rendering void legacies to charitable uses contained in wills executed less than two months before death, is void. *Id.*
4. *Idem* — *Imposition of Trust in Favor of Next of Kin*. When a legacy is given upon a secret trust, having for its object the circumvention of the statute of 1848, equity will not permit the legatee to hold the legacy, but will declare a trust thereon in favor of the next of kin. *Id.*
5. 1857, *Ch. 456* — *Taxation of Savings Banks*. When, under the statutes of its domicile regulating the operations of a savings bank and governing its obligations and duties (as, under the statutes of Connecticut governing the Groton Savings Bank), its surplus or profits from investments must, after reaching a certain amount and at certain times, be distributed to the depositors, such surplus belongs in equity to the depositors and is within the purview of the statute (L. 1857, ch. 456, § 4) exempting deposits in savings banks from taxation against the bank as personal property. *People ex rel. Groton S. Bank v. Barker*. 122
6. 1870, *Ch. 166* — *Past Appropriations not Violative of the Constitution*. It does not follow that, if the New York Institution for the Blind is charitable, appropriations made to it in the past by the state for the education and support of pupils, and appropriations made by the counties of New York and Kings (under L. 1870, ch. 166, § 3) of the sums required for clothing the indigent pupils who were residents of the county making the appropriation, were violative of the Constitution (Art. 8, §§ 8, 11, of 1874). *People ex rel. N. Y. Inst. for the Blind v. Fitch*. 14
7. *Idem* — *Mandatory Appropriation*. The charitable character of the New York Institution for the Blind is not changed if the provisions of the statute (L. 1870, ch. 166, § 3) requiring the counties of New York and Kings to appropriate money to clothe indigent pupils is mandatory, and hence in conflict with the Constitution of 1894 (Art. 8, § 14), which is not decided. *Id.*
- 1872, ch. 562. See par. 2, this title.
8. 1880, *Ch. 542* — *Corporation Tax — Foreign Corporations — Conditions Precedent to Jurisdiction*. The jurisdiction to tax foreign corporations under chapter 542, Laws of 1880, as amended by chapter 501, Laws of 1885, depends upon the existence of two concurring conditions, namely, that the corporation shall be "doing business in this state," and that its capital or some portion thereof shall have been "employed within this state." *People ex rel. C. J. R. & U. S. Co. v. Roberts*. 1
9. *Idem* — *Foreign Investment Company — Capital not Employed within this State*. A foreign corporation, whose capital is wholly invested in the stock and bonds of an independent foreign corporation doing business wholly out of this state, whose whole income is derived from such investment, and which maintains a leased office, with furniture, officers and clerks, in this state, where it receives and distributes the dividends or income derived from its investment, which constitutes its whole business, is not subject to taxation under the act of 1880-1885, since, although it is "doing business in this state," no part of its capital is "employed within this state," within the meaning of the statute. *Id.*
10. *Idem* — *Corporation Tax — Basis, when no Dividends or Sales of Stock*. The basis for assessing the tax under chapter 542, Laws of 1880, as

- amended before 1896, upon the capital stock employed in this state of a corporation which has paid no dividends, and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock. *People ex rel. W. & H. Co. v. Roberts*. 101
11. 1882, Ch. 409 — *Tax on Bank Shares — Foreign Savings Bank*. For the purposes of local taxation in this state of a savings bank of another state, upon stock of banks in this state held by it, (L. 1882, ch. 409, § 312), the question whether its surplus belongs in equity to its depositors, so as to constitute a debt or liability available as an offset to the assessment, depends upon the statutory provisions of its own state. *People ex rel. Groton S. Bank v. Barker*. 122
12. *Idem — Tax on Bank Shares Owned by Savings Bank — Deposits as Offset*. A savings bank's deposits constitute a debt to its depositors and are to be deducted from its total assets, as a liability, in setting off its debts against the value of stock of banks in this state owned by it, for the purposes of local assessment and taxation on such stock, under the Banking Law (L. 1882, ch. 409, § 312). *People ex rel. Bridgeport S. Bank v. Barker*. 128
13. 1884, Ch. 107 — *Monroe County — Refund of Illegal Tax*. A person who has paid an illegal tax upon land in Monroe county is not confined to an application for relief under the local statute (L. 1884, ch. 107, § 23); and the fact that he has proceeded under that statute and failed to obtain relief, does not preclude him from proceeding for a refund, under the County Law. *Matter of Adams v. Suprs. Monroe Co.* 619
14. 1884, Ch. 439 — *Railroads — Low Bridge — Warning Signals*. In an action for damages for the death of a freight brakeman, alleged to have resulted from the negligence of the defendant railroad company in failing to provide the warning signals required by statute (L. 1884, ch. 439, § 2) to protect employees on top of cars from injury by a low bridge, *held*, that the essential fact that the death was caused by the bridge was not established by evidence that the deceased was standing apparently in good health on the top of a car just before the train passed under the bridge, which was from four feet seven inches to six feet three inches above the tops of the cars, and that immediately thereafter he was found lying on top of the same car, near the center, in a dying condition, without the production of, or the effort to procure, further evidence that he died from violence instead of disease, such as evidence tending to show a wound or a bruise upon his person. *Fitzgerald v. N. Y. C. & H. R. R. Co.* 263
- 1885, ch. 501. See par. 8, this title.
15. 1887, Ch. 310 — *Special Act Releasing Interest of State in Property Devised to Aliens*. See *McGillis v. McGillis*. 532
16. 1887, Ch. 503 — *General Assignment — Preferences*. When a chattel mortgage, executed and delivered by a debtor to one of his creditors, and a transfer of business accounts to a third person, do not cover all the debtor's property, and are only intended to secure the payment of debts of the mortgagee and certain other creditors mentioned therein, they are not within the statute which regulates the making of general assignments for the benefit of creditors, and prohibits preferences for more than one-third of the assigned estate (L. 1887, ch. 503). *Delaney v. Valentine*. 692
17. 1887, Ch. 713 — *Application of Transfer Tax Acts of 1887 and 1892*. In a proceeding instituted in 1896, upon the determination of the particular estate, to ascertain the amount of the transfer tax upon a legacy in remainder under the will of a testator who died in 1890, the rights of the parties depend upon the statute as amended in 1887 (Ch. 713), but the method of procedure depends

- upon the statute of 1892 (Ch. 399).
Matter of Sloane. 109
18. 1888, Ch. 345 — *City of Buffalo — Grade Crossing Act — Award for Injury from Change of Grade of Street.* Under the provisions of the Grade Crossing Act of the city of Buffalo (L. 1888, ch. 345, § 12, amd. L. 1890, ch. 255), which authorize the grade crossing commissioners to procure the appointment of commissioners of award when they have decided that the grade of a street shall be changed and that any property may be injured by the improvement "for which the owners or persons interested therein are lawfully entitled to compensation," an injury to property by change of grade of the street (as, by an overhead viaduct) may be the subject of an award to the owners or persons interested, although the property is not actually taken. *Matter of Grade Crossing Comrs.* 550
19. *Idem* — "Lawfully Entitled to Compensation." This is so, even on the assumption that the words "are lawfully entitled to compensation" refer to such right of compensation as was already authorized by existing laws and did not create any new right, since at the time of their enactment abutting property owners were lawfully entitled, under the city charter, to compensation for injuries caused by a change of street grade, when made by the city. *Id.*
20. 1889, Ch. 42 — *Act enabling foreign-born children of a Woman born in this Country and married to an Alien, to take Devises of real estate.* See *McGillis v. McGillis* 532
- 1890, ch. 255. See par. 18, this title.
21. 1890, Ch. 565 — *Railroad Law — Street Surface Railroads — Proceeding to Acquire Use of Connecting Tracks.* The requirement of the Railroad Law which, by virtue of section 91, compels a street surface railroad company to obtain the consents of the local authorities and abutting owners to such use before it can apply to acquire the right to use the connecting track of another company by a proceeding *in writum* under section 102 of that law, is absolute and does not depend upon what the defendant company might have the power to voluntarily agree to. *Colonial City Tr. Co. v. Kingston City R. R. Co.* 493
22. 1890, Ch. 569 — *Town Law — Town Supervisor — Eligibility to Office.* The disqualification imposed by the Town Law (L. 1890, ch. 569, § 50), that "no trustee of a school district shall be eligible to the office of supervisor of any town or ward in this state," applies to the capacity of a candidate for election, as well as to the holding of the office. *People v. Purdy.* 439
23. 1892, Ch. 399 — *Transfer Tax Act — Value at Date of Transfer.* The meaning and intention of the act of 1892 (Ch. 399, § 11) are that if an interest subject to the tax is of such a nature that its value cannot be ascertained immediately after its transfer, it is to be appraised at its fair and clear market value at the date of the transfer, whenever such value can be ascertained. *Matter of Sloane.* 109
24. *Idem* — *Determination of Prior Estate by Remarriage — Appraisal of Remainder.* In a proceeding under the act of 1892, instituted on the determination of the particular estate by remarriage, to appraise a legacy given in remainder after the death or remarriage of the testator's widow, the title to which was transferred on the death of the testator, the value of the estate of the widow during the period of her widowhood is to be deducted from the principal of the fund. *Id.*
25. *Idem* — *Exemption Based on "Mutually Acknowledged Relation of Parent."* Within the provisions of the Transfer Tax Act (L. 1892, ch. 399, § 2) which exempts from taxation transfers of real property, and of personal property not exceeding \$10,000 in value, passing to "any person" to whom the decedent, etc., "for not less than ten years prior to such transfer, stood

in the mutually acknowledged relation of parent," a testator may sustain to a person not of his blood, and not legally adopted, the relation of parent so as to entitle such person to the benefit of the exemption. *Mutter of Beach*. 242

26. *Idem — Illegitimate Children*. The exemption based upon the "mutually acknowledged relation of parent" is not limited to illegitimate children, but extends as well to persons not of the blood of a testator, between whom and the testator the relation of parent and child has been mutually recognized for ten years prior to the testator's death. *Id.*

27. *Idem — Adults*. The fact that a person was at the inception of the mutually acknowledged relation an adult, does not exclude him from the benefit of the exemption. *Id.*

See, also, par. 17, this title.

28. 1892, Ch. 673 — *Manufacturing Establishments — Fire Escapes*. Screwing down the sashes in the windows adjoining the fire escapes on a manufacturing establishment, and requiring the employees to keep them closed, in order to maintain a high temperature necessary to the work carried on, do not constitute a violation of the statute prescribing the maintenance of fire escapes embracing "windows at each story and connecting with the interior by easily accessible and unobstructed openings" (L. 1892, ch. 673, § 6), provided the sashes are so light as to be easily broken through. *Huda v. American Glucose Co.* 474

29. 1892, Ch. 686 — *County Law — Refund of Illegal Tax*. An executor, upon whom an express general power of sale has been conferred by a will devising real estate to the testator's children, to be equally divided among them, with a trust as to the share of one child for maintenance until a certain age, is warranted in paying taxes, illegal because assessed against the "estate" or "heirs" of the decedent, in order to make

sale of the land under the power contained in the will, and is entitled to obtain a refund by proceeding under section 16 of the County Law (L. 1892, ch. 686). *Matter of Adams v. Suprs. Monros Co.* 619

30. *Idem — Refund of Illegal Tax*. The provision of the County Law (L. 1892, ch. 686, § 16) which confers upon the board of supervisors power to refund to any person the amount of an illegal tax collected from him, and upon the County Court power to direct that it be refunded, was intended for the benefit of a party who pays an illegal tax voluntarily, as well as one who pays under duress. It is a general provision, for the benefit of any one from whom an illegal tax has been collected. *Id.*

31. *Idem — Procedure*. The application of the taxpayer to the board of supervisors and to the county judge, under section 16 of the County Law, for the refund of an illegal tax paid by him, is informal and not governed by any established rules of procedure. *Id.*

32. *Idem — Town Highway — Imposition of Conditions upon Construction*. In legislating for a town, under the provisions of the County Law (L. 1892, ch. 686, §§ 69, 70) which empower the board of supervisors of each county to authorize a town to borrow money upon its bonds to build highways and to expend it for that purpose, the board has power to impose conditions as to details, for the interest of the taxpayers, not specified in the statute, such as safeguards to the letting of contracts, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer, to be paid out only upon the certificate of the engineer; and such conditions, so imposed, are binding upon the town commissioners of highways. *People ex rel. Wakeley v. McIntyre*. 628

33. *Idem — Maintenance of Bridge a Governmental Duty*. Whether the maintenance of highways and

bridges is devolved as a duty upon the towns, or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental; and this is especially so in respect to the duty imposed by the County Law (L. 1892, ch. 686, § 68) upon the counties, of maintaining a bridge which spans navigable waters of the state, forming a boundary line between two counties. *Markey v. County of Queens.* 675

34. *Idem* — *Counties Municipal Corporations.* The provisions of the County Law (L. 1892, ch. 686) declaring a county to be a municipal corporation (§ 2), and that an action "to recover damages for any injury to any property or rights for which it is liable" shall be in the name of the county (§ 3), import no further liability on the part of a county than that which existed at their enactment. *Id.*

35. *Idem* — *Distinction between Counties and Cities.* There is a distinction between counties as civil divisions of the state for purposes of local government, and chartered municipal corporations, in respect to their liability for corporate acts. This distinction was not abrogated by the County Law, and it was not intended, by the provisions of that law, that counties should be treated as upon a par with cities, when engaged in similar transactions. *Id.*

36. 1892, Ch. 691 — *Business Corporations Law — Consolidated Corporation — Dissolution — Liability for General Note of Constituent Corporation.* Where, at the time of the consolidation of business corporations under the statute (L. 1892, ch. 691, § 8 *et seq.*), they are severally indebted to a bank upon promissory notes, and the notes mature and are renewed by notes of the same amounts and tenor after the consolidation, which new notes are held by the bank at the time of the commencement of a proceeding for the voluntary dissolution of the consolidated corporation, their payment as a claim against the consolidated corporation cannot be defeated on the ground that the taking of the re-

newal notes after the consolidation paid the notes which were outstanding against the constituent corporations at the time of their consolidation and discharged the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations, where it is established as a fact that the taking of the renewal notes was not intended by any of the parties to the notes or to the transaction as a payment, but merely as an extension of the original obligations. *Matter of Utica Nat. Brewing Co.* 268

37. *Idem* — *Judgment against Constituent Corporation.* Nor, in such case, does the fact that the creditor bank has reduced the liability of the constituent corporations, upon the notes held by it, to judgment discharge the consolidated corporation from its statutory liability for the payment of the debts of the constituent corporations. *Id.*

38. *Idem* — *Concurrent Remedies.* Under the statute (L. 1892, ch. 691, § 12), the pursuit, by the creditor of a corporation which has entered into a consolidation, of a remedy against his original debtor presents no legal obstacle to an effort to collect his debt from the consolidated corporation. *Id.*

1893, ch. 171. See par. 40, this title.

1894, ch. 449. See par. 40, this title.

39. 1894, Ch. 556 — *Consolidated School Law — Institutions for Instruction of the Blind.* The fact that institutions for the instruction of the blind are subject to the visitation of the superintendent of public instruction (L. 1894, ch. 556, tit. 15, art. 14) does not prevent such an institution from being charitable in its character and purpose, and, hence, also subject to the visitation of the state board of charities (Const. art. 8, § 13). *People ex rel. N. Y. Inst. for the Blind v. Fitch.* 14

40. 1895, Ch. 639 — *Town of Gravesend — Annexation to Brooklyn — Issuance of Bonds for Street Improvements.* Chapter 639, Laws

- of 1895, creating a commission to determine claims, and providing for the issuance of bonds, for payment for public improvements in the late town of Gravesend, annexed to the city of Brooklyn by chapter 449, Laws of 1894, does not deprive the holder of a contract for constructing and grading a highway, executed by the town authorities before the annexation, in a proceeding pending and unfinished at the time of the passage of the act of annexation, of the right to have bonds in payment of work done by him issued by the supervisor of the town, under chapter 171, Laws of 1893, where he has not submitted his claim for determination under the act of 1895. *People ex rel. Dady v. Supr. of Gravesend.* 381
41. 1895, Ch. 754 — *Charitable Institutions — Supervision of State Board of Charities.* It is not necessary that an institution should be wholly charitable to fall within the provisions of the Constitution (Art. 8, §§ 11-15) and the statutes (L. 1895, chs. 754, 771) placing charitable institutions under the supervision and rules of the state board of charities. It is enough if the institution is partly charitable in its character and purpose. *People ex rel. N. Y. Inst. for the Blind v. Fitch.* 14
- 1895, ch. 771. See par. 41, this title.
42. 1895, Ch. 946 — *Code Civ. Pro. § 1338 — Amendment — Jury Trial.* The substitution of the words "a determination in the trial court" for the words "a decision of the trial court upon a trial without a jury," in section 1338 of the Code of Civil Procedure, by the amendment of 1895 (Ch. 946), did not extend the right of review by the Court of Appeals of a reversal of a judgment entered upon the verdict of a jury. *Henawie v. N. Y. C. & H. R. R. Co.* 278
43. 1896, Ch. 772 — *District Attorney of Kings County.* Chapter 772, Laws of 1896, providing that district attorneys of Kings county shall be elected once in every four years, was, in so far as it assumed to fix at four years the term of the incumbent who had been elected in November, 1895, invalid as an exercise of the power conferred by the Constitution upon the legislature to fix the term, and is, to that extent, unconstitutional and void. *People ex rel. Eldred v. Palmer.* 133
44. *Idem — Election of 1899.* That part of the act of 1896 (Ch. 772) which prescribes a term of four years for the office of district attorney of Kings county, from and after December 31, 1899, is separable, and is a valid fixing of the terms of the officers to be elected in that and subsequent years. *Id.*
45. 1897, Ch. 378 — *Greater New York Charter — Participation in Public School Fund.* It does not follow from the fact that the charter of Greater New York (L. 1897, ch. 378, § 1161) authorizes the board of education to distribute a ratable proportion of the school fund to every pupil in the New York Institution for the Blind, that the institution must be regarded as purely educational and not charitable. *People ex rel. N. Y. Inst. for the Blind v. Fitch.* 14

SOCIETIES.

See WILL, 2-7.

SPECIFIC PERFORMANCE.

1. *Rules.* Rules governing the enforcement of specific performance of contracts for the sale of land collated. *Heller v. Cohen.* 299
2. *Vendor and Purchaser — Marketable Title — Material Defects.* The title of the vendor of land is not a marketable one, and he cannot compel the purchaser to accept it, where it is based, as to a portion of the premises, upon a description in a referee's deed in partition which covers premises other than those described in the decree of sale, and as to another portion he shows no record title, and it is found as an inference, not opposed to the weight of evidence, from special facts and circumstances, that such defects are material. *Id.*

3. *Materiality of Defect in Title—Question of Fact.* The question as to the materiality of a defect in the offered title, in an action for specific performance, is one of fact when it depends upon, and is an inference to be drawn from, circumstances; and the Appellate Division is not authorized to reverse a decision of the trial court upon such question of fact, where there is no such preponderance of proof against the result reached by it as discloses, with reasonable certainty, that its conclusion was erroneous, or against the weight of evidence. *Id.*

4. *Variance in Description of Land.* A variance in the description of land in instruments essential to the title, such as between stating the place of beginning in one as the "northwest" corner of certain streets and in the other as the "southwest" corner, cannot be disregarded or changed, in support of an offered title, in an action to compel the purchaser to perform his contract, where there is no sufficient description in the instrument sought to be changed to plainly indicate the property intended and also to show that there is an error in the description which may be disregarded and the property still clearly identified. *Id.*

See EQUITY, 2.

STATE BOARD OF CHARITIES.

See CORPORATIONS, 1-8, 13, 14.

STATE AID.

See CONSTITUTIONAL LAW, 7.

STATUTES.

See REVISED STATUTES.
SESSION LAWS.

STATUTE OF FRAUDS.

See PLEADING, 1-3.
REVISED STATUTES, 11.

STATUTE OF LIMITATIONS.

See PARTITION, 5.

STATUTE OF PERSONAL USES.

See REVISED STATUTES, 7-10.

STIPULATION.

See EVIDENCE, 6.

STOCKHOLDERS.

See CORPORATIONS, 19, 20.

STOCK DIVIDENDS.

See TRUSTS, 6.

ST. JOHN LAND (SOCIETY OF).

See WILL, 7.

STREETS.

See BINGHAMTON (CITY OF).
NEGLIGENCE, 2, 5, 6, 8.

STREET IMPROVEMENTS.

See ASSESSMENT, 5.
GRAVESEND (TOWN OF), 1.

STREET RAILROAD.

See NEGLIGENCE, 2.
RAILROADS, 2.

SUPERINTENDENT OF PUBLIC INSTRUCTION.

See CORPORATIONS, 3.

SUPERVISORS.

See CONSTITUTIONAL LAW, 17, 18.
GRAVESEND (TOWN OF), 2.
OFFICERS, 5-7.

SUPPLEMENTARY PROCEEDINGS.

See PERSONAL PROPERTY.

SUPREME COURT.

1. *Appellate Division — Reversal — New Trial.* The Appellate Division, upon reversing a judgment, must grant a new trial unless it is manifest that no possible proof applicable to the issue could entitle the respondent to recover. *Heller v. Cohen.* 299

2. *Materiality of Defect in Title — Question of Fact.* The question as to the materiality of a defect in the offered title, in an action for specific performance, is one of fact when it depends upon, and is an inference to be drawn from, circumstances; and the Appellate Division is not authorized to reverse a decision of the trial court upon such question of fact, where there is no such preponderance of proof against the result reached by it as discloses, with reasonable certainty, that its conclusion was erroneous, or against the weight of evidence. *Id.*

See APPEAL, 5, 22, 24, 25.
COURTS, 11.

SURPLUS.

See TAX, 12-14.

SURROGATES.

1. *Contempt — Imprisonment for Non-payment of Costs.* Section 2555 of the Code of Civil Procedure, authorizing the enforcement of certain decrees of a Surrogate's Court by proceedings for contempt, does not apply to decrees for the payment of costs only; and as to such a decree a surrogate is subject to the general provision of section 15, prohibiting imprisonment for non-payment of costs except in the cases specified therein. *In re Hunfreuille.* 115

2. *Removal of Executor — Costs.* When the only payment of money directed by a decree of a Surrogate's Court removing an executor is costs, it cannot be enforced by imprisonment. *Id.*

See EXECUTORS AND ADMINISTRATORS, 1-3.

TAX.

1. *Corporation Tax — Foreign Corporations — Conditions Precedent to Jurisdiction.* The jurisdiction to tax foreign corporations under chapter 542, Laws of 1880, as amended by chapter 501, Laws of 1885, depends upon the existence of two concurring conditions, namely, that the corporation shall be "doing business in this state," and that its capital or some portion thereof shall have been "employed within this state." *People ex rel. C. J. R. & U. S. Co. v. Roberts.* 1

2. *Foreign Investment Company — Capital not Employed within this State.* A foreign corporation, whose capital is wholly invested in the stock and bonds of an independent foreign corporation doing business wholly out of this state, whose whole income is derived from such investment, and which maintains a leased office, with furniture, officers and clerks, in this state, where it receives and distributes the dividends or income derived from its investment, which constitutes its whole business, is not subject to taxation under the act of 1880-1885, since, although it is "doing business in this state," no part of its capital is "employed within this state," within the meaning of the statute. *Id.*

3. *Corporation Tax — Basis, when no Dividends or Sales of Stock.* The basis for assessing the tax under chapter 542, Laws of 1880, as amended before 1896, upon the capital stock employed in this state of a corporation which has paid no dividends, and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock. *People ex rel. W. & H. Co. v. Roberts.* 101

4. *Actual Value of Capital Stock.* The actual value of the capital stock of such a corporation is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business, including its right to conduct it under its franchise. *Id.*

5. *Transfer Tax—Method of Procedure.* The method of procedure in a proceeding for the ascertainment and determination of a transfer or inheritance tax is controlled by the statute on the subject in force at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute. *In re Sloane.* 109
6. *Application of Acts of 1887 and 1892.* In a proceeding instituted in 1896, upon the determination of the particular estate, to ascertain the amount of the transfer tax upon a legacy in remainder under the will of a testator who died in 1890, the rights of the parties depend upon the statute as amended in 1887 (Ch. 713), but the method of procedure depends upon the statute of 1892 (Ch. 399). *Id.*
7. *Valuation for Basis of Tax.* The test by which a transfer or inheritance tax is to be measured is the value of the estate at the time of the transfer of title and not its value at the time of the transfer of possession. *Id.*
8. *Time of Transfer of Title.* The death of the testator is the time of the transfer of title to a legacy in remainder, when there is no uncertainty as to the person who will take in remainder, although there is uncertainty as to when the legacy will be paid over to the remainderman. *Id.*
9. *Valuation of Life Estate.* The value of a life estate subject to determination by an event happening prior to the death of the life tenant and dependent wholly upon the volition of the latter (such as remarriage) cannot be ascertained until the estate has terminated. *Id.*
10. *Value at Date of Transfer.* The meaning and intention of the act of 1892 (Ch. 399, § 11) are that if an interest subject to the tax is of such a nature that its value cannot be ascertained immediately after its transfer, it is to be appraised at its fair and clear market value at the date of the transfer, whenever such value can be ascertained. *Id.*
11. *Determination of Prior Estate by Remarriage—Appraisal of Remainder.* In a proceeding under the act of 1892, instituted on the determination of the particular estate by remarriage, to appraise a legacy given in remainder after the death or remarriage of the testator's widow, the title to which was transferred on the death of the testator, the value of the estate of the widow during the period of her widowhood is to be deducted from the principal of the fund. *Id.*
12. *Savings Bank—Surplus.* When the surplus of a savings bank, under the statutes of its domicile, belongs in equity to, and is subject to distribution among, its depositors, it is to be deemed a liability as well as an asset, and comes within the principle that deposits in savings banks are debts that can be used to offset or extinguish assessments against the bank upon personal property. *People ex rel. Groton S. Bank v. Barker.* 122
13. *Foreign Savings Bank—Tax on Bank Shares.* For the purposes of local taxation in this state of a savings bank of another state, upon stock of banks in this state held by it (L. 1882, ch. 409, § 312), the question whether its surplus belongs in equity to its depositors, so as to constitute a debt or liability available as an offset to the assessment, depends upon the statutory provisions of its own state. *Id.*
14. *Connecticut Savings Bank.* When, under the statutes of its domicile regulating the operations of a savings bank and governing its obligations and duties (as, under the statutes of Connecticut governing the Groton Savings Bank), its surplus or profits from investments must, after reaching a certain amount and at certain times, be distributed to the depositors, such surplus belongs in equity to the depositors and is within the purview of the statute (L. 1857, ch. 456, § 4) exempting deposits in savings banks from taxation against the bank as personal property. *Id.*

15. *Tax on Bank Shares Owned by Savings Bank—Deposits as Offset.* A savings bank's deposits constitute a debt to its depositors and are to be deducted from its total assets, as a liability, in setting off its debts against the value of stock of banks in this state owned by it, for the purposes of local assessment and taxation on such stock, under the Banking Law (L. 1882, ch. 409, § 312). *People ex rel. Bridgeport S. Bank v. Barker.* 128
16. *Foreign Savings Bank.* A savings bank of another state, on being assessed for local taxation here upon stock of banks in this state owned by it, is entitled to all the deductions and exceptions allowed to a private citizen of this state in the assessment of his personal property. *Id.*
17. *United States Bonds.* In assessing a savings bank for local taxation upon stock of banks in this state owned by it, it is entitled to deduct from the apparent surplus, arrived at by deducting from its assets the amount due its depositors, the value of United States bonds in which such surplus is invested. *Id.*
18. *Transfer Tax Act—Exemption Based on "Mutually Acknowledged Relation of Parent."* Within the provision of the Transfer Tax Act (L. 1892, ch. 399, § 2) which exempts from taxation transfers of real property, and of personal property not exceeding \$10,000 in value, passing to "any person" to whom the decedent, etc., "for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of parent," a testator may sustain to a person not of his blood, and not legally adopted, the relation of parent so as to entitle such person to the benefit of the exemption. *In re Beach.* 242
19. *Illegitimate Children.* The exemption based upon the "mutually acknowledged relation of parent" is not limited to illegitimate children, but extends as well to persons not of the blood of a testator, between whom and the testator the relation of parent and child has been mutually recognized for ten years prior to the testator's death. *Id.*
20. *Adults.* The fact that a person was at the inception of the mutually acknowledged relation an adult, does not exclude him from the benefit of the exemption. *Id.*
21. *Review of Assessment.* When the only question raised under a writ of certiorari to review an alleged erroneous or unequal assessment is, in effect, whether there was sufficient in the evidence before the assessors to justify them in making the assessment at the figure in question, and a reassessment is ordered by the Special Term and its order is affirmed by the Appellate Division, it must be assumed that both those courts decided the question adversely; and as the ordering of a reassessment, on reaching such conclusion, is proper under the statute, it raises no question of law for review by the Court of Appeals. *People ex rel. Malcom Br. Co. v. Bd. Assessors Bklyn.* 437
22. *Payment of Illegal Tax by Executor—Refund under County Law.* An executor, upon whom an express general power of sale has been conferred by a will devising real estate to the testator's children, to be equally divided among them, with a trust as to the share of one child for maintenance until a certain age, is warranted in paying taxes, illegal because assessed against the "estate" or "heirs" of the decedent, in order to make sale of the land under the power contained in the will, and is entitled to obtain a refund by proceeding under section 16 of the County Law (L. 1892, ch. 686). *Matter of Adams v. Supra. Monroe Co.* 619
23. *County Law—Refund of Illegal Tax.* The provision of the County Law (L. 1892, ch. 686, § 16) which confers upon the board of supervisors power to refund to any person the amount of an illegal tax collected from him, and upon the County Court power to direct that it be refunded, was intended for the benefit of a party who pays an

illegal tax voluntarily, as well as one who pays under duress. It is a general provision, for the benefit of any one from whom an illegal tax has been collected. *Id.*

24. *Monroe County — Local Statute.*

A person who has paid an illegal tax upon land in Monroe county is not confined to an application for relief under the local statute (L. 1884, ch. 107, § 23); and the fact that he has proceeded under that statute and failed to obtain relief, does not preclude him from proceeding for a refund, under the County Law. *Id.*

25. *Proceedings under County Law.*

The application of the taxpayer to the board of supervisors and to the county judge, under section 16 of the County Law, for the refund of an illegal tax paid by him, is informal and not governed by any established rules of procedure. *Id.*

TEMPORARY ADMINISTRATION.

See INSURANCE, 4, 5, 7, 9.

TENANTS IN COMMON.

See WILL, 12.

TERM OF OFFICE.

See CONSTITUTIONAL LAW, 11-13.

TIME.

See INSURANCE, 9.
TAX, 8.

TITLE.

See PERSONAL PROPERTY.
RIPARIAN RIGHTS, 6.

TOWNS.

Town Highway — Imposition of Conditions upon Construction. In legislating for a town, under the provisions of the County Law (L.

1892, ch. 696, §§ 69, 70) which empower the board of supervisors of each county to authorize a town to borrow money upon its bonds to build highways and to expend it for that purpose, the board has power to impose conditions as to details, for the interest of the taxpayers, not specified in the statute, such as safeguards to the letting of contracts, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer, to be paid out only upon the certificate of the engineer; and such conditions, so imposed, are binding upon the town commissioners of highways. *People ex rel. Wakeley v. McIntyre.* 628

See COUNTIES, 2.
OFFICERS, 5-7.

TRANSFER TAX.

See TAX, 5-11, 18-20.

TRIAL.

See CRIMES, 21.

TRUSTS.

1. *Appeal — Testamentary Trust.*

Where there remains a possibility that the contingencies contemplated by a will, upon which remainders to the immediate beneficiaries of a trust may be defeated, will happen, the question as to whether certain items are to be treated as income or as capital is one in which the trustees have a legal interest sufficient to warrant an appeal. *McLouth v. Hunt.* 179

2. *Life Tenant and Remainderman.*

Where a will creates separate trusts in favor of each of certain persons in being, who are to receive the respective incomes until they arrive at a certain age and then are to receive the corpus, such beneficiaries are to be considered as life tenants before reaching the specified age and as remaindermen thereafter; and the principles governing those relations are applicable to questions as to whether

items of the trust property are to be treated as income or as capital.

Id.

3. Premium upon Trust Securities.

The question whether the depreciation, through approaching maturity, of the premium upon government securities constituting the capital of a testamentary trust estate, and transmitted by the testator, should be borne by the life tenant or by the remainderman, is to be determined by the meaning and intention of the testator, derived from the language employed in the creation of the trust, the relation of the parties to each other, their condition and all the surrounding facts and circumstances.

Id.

4. Depreciation of Premium upon United States Bonds.

A testatrix, in creating a trust of which her grandchildren were, in effect, made life tenants up to a specified age and then remaindermen, directed that while life tenants they should receive the "full income." She owned certain United States bonds which were apportioned by the surrogate to the capital of the trust, at a premium, and they were so retained by the executors as trustees. *Held*, that it was her intention that the life tenants should receive the whole annual interest of the bonds without diminution by the reservation of a portion thereof to meet any depreciation in the market value of the bonds through their approaching maturity — that is, that the premium should not be charged to the life tenants; and that this intention of the testatrix was controlling.

Id.

5. Premium upon Trust Securities.

Quare, whether, upon principle, as between the life tenant and the remainderman of a testamentary trust estate the life tenant can properly be charged with the premium, or with the loss occasioned by the wearing away of the premium, upon government securities in which the estate is invested.

Id.

6. Stock Dividends. When a stock dividend, declared by a corporation and allotted to shares of its

original capital stock belonging to a testamentary trust estate, constitutes, as matter of fact, a distribution of accumulated earnings or profits, it represents income and belongs to the life tenant of the trust estate as between him and the remainderman.

Id.

7. Accumulated Earnings on Corporate Stock.

When questions arise under a will, between life tenant and remainderman, with respect to accumulated earnings upon capital stock of a corporation, the courts must determine them according to the nature and substance of the thing, and are not concluded from treating such earnings as income by the form of their distribution or by the terms employed by the corporation.

Id.

See COURTS, 1.

PARTNERSHIP, 5.

WILL, 1, 3, 5, 9-12, 16, 17, 23, 39, 40.

TRUSTEES (OF SCHOOL DISTRICT).

See OFFICERS, 7.

UNITED STATES BONDS.

See TAX, 17.

TRUSTS, 4.

UNITED STATES CONSTITUTION.

See CONSTITUTIONAL LAW, 15.

UNITED STATES REVISED STATUTES.

See REVISED STATUTES (UNITED STATES).

USES AND TRUSTS (STATUTE OF).

See PARTNERSHIP, 5.

VARIANCE (IN DESCRIPTION).

See REAL PROPERTY, 4, 13.

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE, 2.

VERDICT.

See APPEAL, 11.
CRIMES, 11, 26.

WARD.

See GUARDIAN AND WARD.

WARRANT.

See ATTACHMENT, 1, 2.

WATERWAYS.

See RIPARIAN RIGHTS, 3.

WHARVES.

See RIPARIAN RIGHTS, 6, 7.

WILL.

1. *Trust for Two Lives — Continuing Annuities Charged upon Estate.* The will of a testator who left his wife, a sister, two daughters and grandchildren surviving, gave the entire estate, real and personal, remaining after payment of debts, to his executors in trust to pay his wife \$500 a year during life in lieu of dower; to pay his sister \$400 a year during life, and to pay the remainder of the income to his two daughters, one-half to each, during life. The will provided that if either daughter died during the life of the other, without leaving issue, the survivor should take her deceased sister's share; that if either died during the life of the other leaving issue, the issue should take; and that at the death of the two daughters, the trust property should go to their children absolutely, one half to the children of each, *per stirpes*. *Held*, that there was created a valid trust dependent, as to its duration, upon the lives of the two daughters; that the annuities to the wife and sister were a charge

upon the residuary estate, whether held in trust or freed therefrom by the falling in of the selected lives; and that, at the termination of the trust, the present value of the annuities should be ascertained and the amount paid over to the annuitants, and the remainder of the estate distributed to the remaindermen, discharged of any lien. *Buchanan v. Little.* 147

2. *Attempt to Cure Legacies to Societies Incapable of Taking.* A testamentary provision to the effect that if any institution or society named as legatee shall be unable to take by reason of want of incorporation or for any other cause, the legacy intended for it is bequeathed "absolutely" to its chief executive officer "to be by him applied to the uses and purposes of such institution or society," is void. *Fairchild v. Edson.* 199

3. *Trust — Unlawful Suspension of Absolute Ownership.* Such a provision involves a trust creating an unlawful suspension of the absolute ownership of personal property not measured by lives. *Id.*

4. *Ineffectual Bequest.* Such a provision also involves a bequest to societies unincorporated or otherwise incapable of taking, which cannot be sustained. *Id.*

5. *Charitable Trust — Indefinite Designation of Beneficiaries.* A testatrix who died prior to the act of 1893 (Ch. 701) bequeathed her residuary estate to her executors, "to be divided by them among such incorporated religious, benevolent and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living." *Held*, that the bequest was void for indefiniteness, being an attempt to create a trust which failed to designate the beneficiaries, as a class, with such certainty as to enable the court to execute the trust in case the executors and the person named therein had refused to do so or were dead. *Id.*

6. *Absolute Bequest of Ineffectual Legacies, to Executors Personally.* The will provided that in case any legacy "shall lapse, fail or for any cause not take effect. I give and bequeath the amount which shall lapse, fail or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely, and without limitation or restriction." *Held*, that this provision did not import a trust, but constituted upon its face an absolute gift to the executors as individuals, and hence was valid. *Id.*
7. *Society of St. Johnland.* Chapter 562 of Laws of 1872, amending the charter of the Society of St. Johnland, a charitable society incorporated under chapter 819 of Laws of 1848, does not exempt the society from the general provision of the act of 1848 rendering charitable bequests void when made within two months of the testator's death. *Id.*
8. *Res Adjudicata.* A judgment, in an action dealing with the validity of a will upon its face, adjudging that under a residuary clause the executors took as individual legatees certain legacies absolutely and without limit or restriction, is not a bar to an action by the legal representative of the next of kin, based upon that adjudication and invoking equity to deal with the legacies in the hands of the individual legatees, and insisting that by reason of extrinsic evidence a trust should be impressed thereon for the benefit of the representative of the next of kin. *Id.*
9. *Secret Testamentary Trust — Promise by Legatee.* An express promise in words, by a legatee, to carry out the wishes of the testator, is not requisite to impress a secret trust upon a legacy; an implied promise, through silent acquiescence and tacit consent, is sufficient. *Id.*
10. *Secret Trust in Circumvention of L. 1848, Ch. 319.* A secret trust which has for its object the circumvention of the statute (L. 1848, ch. 319) rendering void legacies to charitable uses contained in wills executed less than two months before death, is void. *Id.*
11. *Imposition of Trust in Favor of Next of Kin.* When a legacy is given upon a secret trust, having for its object the circumvention of the statute of 1848, equity will not permit the legatee to hold the legacy, but will declare a trust thereon in favor of the next of kin. *Id.*
12. *Legacy as Tenancy in Common — Secret Trust — Promise by one Legatee Only.* When a bequest to executors personally and absolutely is not declared by the instrument to be in joint tenancy it must be deemed to be a tenancy in common (1 R. S. 727, § 44); and in case one of such legatees has by a promise, express or implied, to comply with the testator's wishes, impressed his share of the bequest with an unlawful and void secret trust, the shares of the other legatees are not affected thereby, where it does not appear that the promise was made for any one except the individual promisor, and no promise, express or implied, was made by the other legatees. *Id.*
13. *Transfer to Next of Kin, not by Intestacy but by Imposition of Trust.* When the share of a legatee in a residuary bequest is impressed with a void secret trust, it is not thereby thrown into intestacy, but equity will lay hold of it in his hands and impress thereon a trust in favor of the next of kin. *Id.*
14. *Power of Appointment — Suspension of Ownership.* In applying the statutory rule as to the suspension of the absolute ownership of personal property (1 R. S. 773, § 1), the provisions of a will which attempt to execute a power of appointment conferred by will must be tested by reading them into the will which created the power. *Fargo v. Squiers.* 250
15. *Attempted Execution of Power of Appointment — Unlawful Suspension*

sion of Ownership. An attempt, by a will which undertakes to execute a power of appointment conferred by will, to postpone the absolute ownership of personal property covered by the power of appointment, by lives which were not in being at the death of the maker of the will which created the power, violates the statute. *Id.*

16. *Trust — Non-vesting of Ownership.* A trust is created and the ownership of the property is not vested in the beneficiaries as of the date of the death of the maker of the will, but is suspended, where a will gives the property to the executors in trust, to care for and manage it, with extraordinary powers of sale and investment, not only during the infancy of certain beneficiaries, but until they attain a specified age beyond majority, and there is an uncertainty as to the persons who may ultimately take in possession. *Id.*

17. *Application of Testamentary Funds, as between Specific Legacies and Residuary Trust — Equity.* When the subject-matter of a will which creates a trust consists of two estates or funds, one of which is an individual estate which can be lawfully devoted to the purposes of the trust and the other is an appointive estate which cannot be so devoted, and the will contains specific legacies with no direction as to the fund out of which they shall be paid and discloses an intention to devote the whole of the residuary estate to the use of the beneficiaries of the trust, equity can, for the purpose of carrying out such intention so far as lawful, require the specific bequests to be paid out of the appointive estate and thus save the individual estate unimpaired to constitute the trust. *Id.*

18. *Codicil — Construction.* Where the language of a codicil is not plain, or its meaning is doubtful, an interpretation that excludes issue from a vested remainder originally limited by the will upon the life estate of a parent, or prevents

the issue of a deceased child from participation in the estate, is not favored. *Goodwin v. Coddington.* 283

19. *Preservation of Remainder to Issue of Deceased Child.* Where a will gives a share of the estate to a child for life, with remainder over to his issue, if any, and the child dies before the testator, leaving issue, a codicil dealing with the share so originally devised should, if it and the will are reasonably capable of such an interpretation, be construed as continuing the remainder in the issue of the deceased child; and if the codicil imposes some disposition of such share to others, a reasonable construction, limiting such disposition to the substitution of life tenants only, is to be preferred. *Id.*

20. *Vested Remainders.* Where the apparent intention of the testator is that remainders shall vest in persons as to whom there is no uncertainty, subject to the life estate or estates created by the will (as, that they shall vest in his grandchildren, and there are grandchildren in being at his death, and there is nothing in the will making such provision dependent upon survivorship to the time of distribution), the disposition relates back to the time of the testator's death, and the vesting is of that date. *In re Brown.* 513

21. *Power of Sale.* The presence in a will, of an imperative power of sale given to the executors to be exercised at a future time, does not necessarily prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest presently. *Id.*

22. *Conversion of Real Property into Personal.* The fact that by the exercise of the power of sale given to the trustees of an estate for lives, and to which the remainder is subject, real property would become personal property, makes no difference in the effect of the power of sale upon the question of the vesting of the remainder as of the date of the testator's death. *Id.*

23. *Estate of Testamentary Trustees.*

Where an estate is devised in trust, to provide an income for life beneficiaries and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all. *Id.*

24. *Direction to Divide.* The general rule, that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent and not vested, is subordinate to the primary canon of construction, that the intent, to be collected from the whole will, must prevail. *Id.*

25. *Determination of Class.* When a devise or bequest is made to a class, as, to children of children, the class will, in the absence of a definite intention disclosed by the will, be ascertained and determined as of the death of the testator; and if the estate then vests, it vests in the individual beneficiaries as tenants in common. *Id.*

26. *Income Attached to Vested Remainders, Pending Distribution of Corpus.* If a will gives a portion of the income of the estate to the widow for life and the income of a specific share of the residue to each child for life, with remainders over to children's children, in such terms that the remainders vest, at the testator's death, in the grandchildren in being at that time, as tenants in common, subject to the outstanding life estates, with a postponement of distribution dependent upon the death of the widow, the estate vested in the grandchildren draws to it their parent's share in the income, in case of the death of the testator's children, the widow still living; and if a grandchild, whose remainder was vested, dies, his share in such income passes to his personal representative. *Id.*

27. *Bequest Conferring Absolute Power of Disposition.* A residuary

bequest of personal property to one "absolutely during her lifetime, with the right to dispose of it at her death as she may deem fit," confers an absolute power of disposition, and as no remainder is limited upon the property the grantee takes an absolute title. *In re Moehring.* 428

28. *Remainder.* A remainder is not to be considered as contingent in any case where, consistently with the intention of the testator it may be construed as being vested. *Hersee v. Simpson.* 496

29. *"From and After."* The words "from and after," in a testamentary gift of a remainder, following a life estate, do not make the remainder contingent and prevent its being construed as vested, where there is nothing else on the face of the will tending to show that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator. *Id.*

30. *Will Construed—Vested Remainder.* The will of a testator who left a wife and children surviving devised a life estate in his real property to his wife and provided that, "from and after her decease," the property should be disposed of according to the statutes governing the descent of real property. *Held,* that the heirs of the testator upon his death took a vested remainder in his real property. *Id.*

31. *Contingent Remainder.* The will of a testator who died in 1848 devised certain lands in this state to a married daughter for life, and in case her husband survived her, to him for life, and then provided that "from and after the decease of both my said daughter and her said husband, I give, devise and bequeath the remainder or fee simple in said property to the lawful issue of my said daughter then living, in such relative proportions (if such issue consist of more than one person) as they would by the laws of the state of New York have then inherited, or taken the same from her, in case she and they

were then native-born citizens of said state and she had then died intestate, lawfully seized of said property in fee simple." The daughter and her husband survived the testator, and the daughter, with children, survived her husband. *Held*, in an action of partition subsequent to the daughter's death, that the remainder was contingent, and not vested, until the death of the daughter. *McGillis v. McGillis*. 582

32. *Devise of Remainder to Aliens.*

The testator was a citizen of the United States; the daughter was born in the United States, but her husband was an alien, and after her marriage she resided in a foreign country, where her children were born. The daughter, having survived her husband, died in 1893, leaving as her surviving issue six children, three born before the death of the testator and three after, and one infant grandchild, the son of a deceased child born after the death of the testator. At the time of the death of the testator's daughter, the provisions of the Revised Statutes (2 R. S. 57, § 4) making void a devise to a person who, at the time of the death of the testator, is an alien, had been changed by chapter 42 of Laws of 1889, so that such provisions no longer applied to the foreign-born children of a married woman born in this country. *Held*, that as there was no outstanding vested remainder in the way of the operation of the act of 1889, it applied to the devise in question; that, under that statute, existing at the time of the death of the daughter, the devised estate, if it had been hers and she had died intestate, would have descended to her children, the infant grandchild taking his parent's portion, which would have been one-seventh of the estate; and, hence, that the infant was seized of an undivided one-seventh interest in the devised premises. *Id.*

33. *No Escheat while Remainder Contingent — No Vesting by Release from State.*

In an action brought in 1850 for a construction of the will, it was adjudged that the devise to the testator's daughter for

life was valid, she not being an alien, but that the devise to her husband and to her children, who were aliens at the time of the death of the testator, was void and that they had no interest in the estate. In a subsequent action of partition, a judgment was rendered directing that the land devised to the testator's daughter be set off to her for life, with the fee therein to the heirs at law of the testator. In 1887 the Legislature passed a special act (Ch. 310), by which the People released to all the children of the testator's daughter surviving at the time of her death, all the interest of the state in the property, and granted to them all the title which, by escheat, was vested in the People. The children of the testator's daughter who were born before the testator's death then conveyed to her after-born children all their interest in the property, the after-born children agreeing to share equally with them should they succeed in establishing title. Thereupon, the after-born children, as plaintiffs in a cross action against the testator's heirs at law, obtained an adjudication declaring that the remainder was, by force of the act of 1887, vested in the four after-born children, and barring the testator's heirs at law from all title thereto. *Held*, that these adjudications did not affect the above construction of the will, since, in so far as they adjudged the remainder to belong to the heirs at law, the court exceeded its power, and, as the remainder was contingent, nothing could escheat or vest in the state until the life estate terminated, and as, upon the happening of that event general laws intervened, under which the children of the testator's daughter were permitted to take the estate, the state had, in 1887, no estate which it could convey. *Id.*

34. *Effect of Former Adjudication.*

The infant grandchild, the son of a deceased daughter of the testator's daughter born after the testator's death, claimed in the present action that, as his mother was one of the four after-born children, he was entitled to one-fourth of the devised estate, instead of one-

seventh, and that he was not bound by her agreement to share equally with the first-born children. *Held*, that this claim was not helped by the judgment in the cross-action, since, although it decided that the share of the grandchild's mother was one-fourth, this share was, under that judgment, subject to her contract, making her resulting share one-seventh.

Id.

35. *Attorney — Equitable Lien for Services.* Prior to the death of the testator's daughter (the life tenant), her children (the remaindermen), including the mother of the infant grandchild, being aliens, contracted with an attorney at law to convey to him a parcel of the devised land, in consideration of his obtaining necessary legislation and conducting litigation to establish their rights as against the testator's heirs at law. The attorney succeeded in his undertaking, and the children thereupon deeded to him the stipulated parcel of land. The infant grandchild was born thereafter. The contract was found to be fair and reasonable. *Held*, that the after-born grandchild was bound by the contract and conveyance to the attorney, on the ground that the attorney had an equitable lien for the services rendered by him for the estate, of which the grandchild had received the benefit, and that the grandchild's interest in the property was subject to such lien.

Id.

36. *Gift of Rents and Income.* A testamentary gift of the rents and profits of land, or gift of the income arising from personal property, vests such an estate in the devisee or legatee as conforms to the evident intention of the testator. *Durfee v. Pomeroy.* 583

37. *Suspension of Power of Alienation.* The fact that the executors, as such, may have to deal with the income of the vested interests in order to carry out the provisions of the will does not create any illegal suspension of the power of alienation. *Id.*

38. *Will Construed.* The will of a testator who left surviving a mar-

ried daughter and an unmarried son, created two distinct trusts, each consisting of one-half of the residuary estate, real and personal, the rents and income of one to be paid to the daughter for life, and the rents and income of the other to be paid to the son until he attained the age of forty-five, or until such later period at which the executors might deem him fit to receive the principal. The will disclosed an intention that the property should follow the testator's blood in the ultimate disposition thereof, and in connection with provisions to that intent, declared that if the son, "in the event of his death within the periods aforesaid, should leave no child or children him surviving, but should leave a wife him surviving, then she is to have and I devise and bequeath to her one-half of the income of said half of the rest, residue and remainder of my said property, so long as she shall remain his widow unmarried, the other one-half of said income to be held by my said executors or their successors and paid by them to and for the use of my daughter. In case the wife of my said son should marry again, then the share of said income so bequeathed to her is to go to my daughter if she then survives; if not, to her children." The son died before attaining the age of forty-five, childless, but leaving a widow. *Held*, that the provision for the son's widow was not void as being under a trust which was thereby made to involve an illegal suspension of the power of alienation; but, *held*, that the legal effect of the son's death was to terminate the trust for his benefit, and that the devise and bequest of one-half of the income of the principal theretofore tied up in the trust, to his widow, vested in her a legal estate in one-half of the principal, real and personal, to wit, a life estate during her widowhood. *Id.*

39. *Trust to Executors.* A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. *Matter of Tompkins.* 634

40. *Trust for Lives — Vesting of Remainder.* A trust limited to lives offers no greater obstacle to the present vesting of the remainder in fee or residue of personalty than does a life estate. *Id.*
41. *Alienable Estate.* The grantee of lands devised subject to the execution of a trust has a legal estate against all persons except the trustee (1 R. S. 729, §§ 60, 61); and such an estate is alienable, subject to the execution of the trust. *Id.*
42. *Canons of Construction.* The canons of construction, that effect must be given, if possible, to every part of the will, and that the testator intended to dispose of his entire estate, applied. *Id.*
43. *Eventual Estate.* The rule, that rents and profits undisposed of during a valid limitation of an expectant estate shall belong to the persons presumptively entitled to the next eventual estate (1 R. S. 726, § 40), applied. *Id.*

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PER CURIAM. 178 (Motions to dismiss appeal); 438 (Review of assessment); 773 (Negligence).

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